Supreme Court, U.S.
FILED

OCT 20 2003

(1)

08-616

In The
Supreme Court of the United States

THOMAS ARTHUR MIX, *Petitioner,*
v.
KENNY ROBINSON, WARDEN, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

William R. Case
Counsel of Record

Michael N. Beekhuizen
Eva C. Gildee
Scott A. Campbell
Attorneys

THOMPSON HINE, LLP
10 W. Broad Street
Columbus, OH 43215-3435

614-469-3200

135 pp

QUESTIONS PRESENTED

1. Whether Petitioner's trial counsel provided ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments where trial counsel erroneously advised Petitioner that he faced a sentencing range of 8 to 20 years, but Petitioner was sentenced to life after pleading no contest?

2. Whether Petitioner's no contest plea was not voluntary, knowing and intelligent in violation of the Fourteenth Amendment where Petitioner did not have an accurate understanding of the consequences of his plea, i.e., that he was exposing himself to a life sentence?

PARTIES TO THE PROCEEDING

Petitioner is Thomas Arthur Mix, an individual incarcerated at a Michigan penal facility by virtue of a March 24, 1997, Michigan State court judgment of sentence for his imprisonment for life. Respondent is Kenny Robinson, warden of that facility, named in his official capacity in Petitioner's habeas corpus petition.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties To The Proceedings	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes, Regulation	2
Statutory Provisions Involved	2
Statement of The Case	2
A. State Court Proceedings.	4
B. Federal District Court Proceedings	9
C. Sixth Circuit Proceedings	11
Reasons For Granting The Petition	13
A. Defense Counsel's Gross Mischaracterization Of The Defendant's Potential Sentence Constitutes Ineffective Assistance Of Counsel And Renders A Plea Constitutionally Invalid	13
B. The Sixth Circuit's Analysis Improperly Deprives A Criminal Defendant Of His Right To Rely On The Advice Of Counsel	16
Conclusion	19
Index to Table of Appendix	20

TABLE OF AUTHORITIES

Cases:

Beckham v. Wainwright, 639 F.2d 262 (5th Cir.) 15

Brady v. United States,
397 U.S. 742 (1970) 10, 11, 12, 17

Boykin v. Alabama, 395 U.S. 238 (1969) 12

Cullen v. United States, 194 F.3d 401, 404
(2nd Cir. 1999) 14

Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974) 15

Hill v. Lockhart, 474 U.S. 52 (1985) 17

Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986) 15

Mabry v. Johnson, 467 U.S. 504 (1984) 12

McMann v. Richardson, 397 U.S. 759 (1970) 17

O'Tuel v. Osborne, 706 F.2d 498 (4th Cir. 1983) 14

Strickland v. Washington,
466 U.S. 668 (1984) 7, 9, 11, 14

Teague v. Scott, 60 F.3d 1167 (5th Cir. 1995) 14

United States. v. Bounds, 943 F.2d 541, 546, n.4
(5th Cir. 1991) 16

United States v. Booze, 293 F.3d 516
(D.C. Cir. 2002) 13

United States v. Goins, 51 F.3d 400, 404
(4th Cir. 1995) 16

United States v. Gordon, 156 F.3d 376
(2nd Cir. 1998) 14

United States v. Gordon, 4 F.3d 1567 (10th Cir. 1993) 11, 13

United States v. Hourihan, 936 F. 2d 508, 510, N.3 (11th Cir. 1991) 16

United States v. Padilla, 23 F. 3d 1220, 122, n.2 (7th Cir. 1994) 16

United States v. Ridgeway, 321 F.3d 512 (5th Cir. 2003) 15

Constitution, Statutes and Regulations:

U.S. Const. Amend. VI ..... Passim

U.S. Const. Amend. XIV ..... Passim

Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. 2254, *et. seq.* 2, 9

In the Supreme Court of the United States

No. _____

THOMAS ARTHUR MIX, ***PETITIONER,***

v.

KENNY ROBINSON, WARDEN, ***RESPONDENT.***

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Thomas A. Mix respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (App. B1) is unreported, but is available at 2003 WL 21212528, 64 Fed. Appx. 952. The opinion of the district court denying habeas corpus relief to Petitioner (App. D1) is unpublished. The trial court opinion and order denying Petitioner's motion to withdraw his plea of *nolo contendere* (App. N1) was issued from the bench, and is also unpublished.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 22, 2003. A petition for rehearing was denied on July 22, 2003. App. A1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the Sixth Amendment and of the Due Process Clause of the Fourteenth Amendment is set forth at App. H1 and I1. The text of Title 28 U.S.C. § 2254 is set forth at App. J1.

STATEMENT

On August 26, 1996, Petitioner Thomas A. Mix was indicted in Michigan state court on a charge of assault with intent to murder. Trial counsel advised Petitioner that if he pled no contest, he would face a sentencing range of 8 to 20 years. In reliance on his trial counsel's advice, Petitioner pled no contest to an unreduced charge. Petitioner's trial counsel, however, had incorrectly calculated the sentencing range because he failed to conduct an adequate investigation into Petitioner's criminal history. Rather than 8 to 20 years, Petitioner in fact faced a sentencing range of 180 to 300 months or life. On March 24, 1997, the state trial court sentenced Petitioner to life in prison. Petitioner is 35 years old.

Petitioner seeks a writ of certiorari because the United States Court of Appeals for the Sixth Circuit has denied habeas corpus relief. The Sixth Circuit held that a "miscalculation or erroneous sentence estimation by defense counsel is not a constitutionally deficient performance rising

to the level of ineffective assistance of counsel." App. B10. This holding conflicts with decisions from five other circuits, all of which have held that trial counsel's mischaracterization of the potential sentence – such as the gross mischaracterization that occurred here – constitutes ineffective assistance of counsel and renders a criminal defendant's plea constitutionally invalid.

The Sixth Circuit also held that Petitioner was not prejudiced by his trial counsel's mistaken advice. The Sixth Circuit reasoned that Petitioner should have known the true sentencing range – despite the erroneous advice of his attorney – because the true sentencing range was disclosed in a presentence investigation report provided to Petitioner after his plea, and because the trial court stated the true sentencing range at the sentencing hearing, again well after Petitioner had already pled no contest. This holding also conflicts with decisions from four other circuits, all of which have held that an otherwise invalid plea cannot be cured when the defendant later receives accurate sentencing information in a pre-sentence investigation report.

Finally, the Sixth Circuit effectively required Petitioner to (1) disregard his own attorney's advice, (2) independently understand the law and the true sentencing range, and (3) object at the sentencing hearing, all based on information provided to Petitioner after he had already pled no contest. This analysis turns the constitutional guarantee of effective assistance of counsel on its head. The United States Constitution guarantees Petitioner the right to assistance of counsel – it does not require him to act as his own counsel. As discussed below, this Court should grant the writ of certiorari in order to resolve these important questions of constitutional law.

A. State Court Proceedings.

Petitioner retained trial counsel James Tracey for $750. After meeting with the prosecutor, trial counsel advised Petitioner that if he would plead no contest to an unreduced charge, the prosecutor would drop the habitual offender information in the indictment and agree to a sentence "within the Michigan Sentencing guidelines." Trial counsel advised his client that the applicable sentencing range was 8 to 20 years. App. M6-M7, M11-M13 (Hearing on Motion To Withdraw No Contest Plea). In reliance on this advice, Petitioner pled no contest.

Petitioner's trial counsel, however, had failed to adequately investigate Petitioner's full criminal history. App. M3-M4. In reality, Petitioner's prior record placed Petitioner in the highest category under the Michigan Sentencing Guidelines. Petitioner actually faced a possible sentence of 180 to 300 months or life. App. L8 (Felony Sentencing Hearing).

The trial court's colloquy at the plea hearing exacerbated trial counsel's mistaken advice. At the plea hearing on February 21, 1997, the trial court informed Petitioner that a felony carries a sentence of "up to life *or any term of years*," and explained that "to the extent the plea agreement between the Prosecutor's Office and you confined me to the Michigan Sentencing Guidelines. If I decided to *exceed* the Sentencing Guidelines, you would have an opportunity, sir, to withdraw your plea." App. K4, K6-K8 (Felony Plea Hearing). In fact, there was no sentence which the trial court could have imposed which would have *exceeded* the sentencing guidelines in this case which called for 15 years to life.[1] Furthermore, based on the trial court's plea colloquy, Petitioner reasonably believed that he would

[1] Michigan has not had the death penalty since the early 1800s.

be able to withdraw his plea if the trial court sentenced him to a term in excess of 20 years. App. M13 (Hearing on Motion To Withdraw No Contest Plea).

At the sentencing hearing on March 24, 1997, the trial court informed the parties that it had "scored this case as a D-4 under the Michigan Sentencing Guidelines resulting in a guideline range of 180 to 300 months or life." App. L8 (Felony Sentencing Hearing). The trial court sentenced Petitioner to life.

After sentencing, Petitioner and his family made repeated attempts to contact trial counsel Tracey without success. Trial counsel never returned their telephone calls. App. M22-M23 (Hearing on Motion To Withdraw No Contest Plea). Petitioner, however, ultimately succeeded in obtaining new counsel and filed a motion to withdraw his no contest plea. Petitioner argued that his counsel had rendered ineffective assistance of counsel and that his plea was involuntary because he did not understand that he faced a life sentence.

The trial court held an evidentiary hearing on the motion on February 2, 1998. Both Petitioner and his trial counsel Tracey testified at the hearing. Petitioner testified that trial counsel told him the sentencing range would be 8 to 20 years and that he pled no contest in reliance on his trial counsel's advice. App. M11-M13. Trial counsel Tracey, in turn, testified that he could not remember the exact range he discussed with Petitioner, but that it may have been 8 to 20 years. App. M6-M7. Trial counsel, however, admitted that he misadvised Petitioner regarding the potential sentence and that, as a result, Petitioner was not aware that he faced a life sentence. Specifically, trial counsel Tracey testified as follows:

Q: [Mr. Millstein]: Okay. Before the plea, did you discuss that maybe the guidelines are going to include a life sentence?

A: [Mr. Tracey]: Specifically I don't remember that we did.

* * *

Q: [Mr. Millstein]: And is it correct that from what you know about it, he did not know that the guidelines would be 180 to 300 or life?

A: [Mr. Tracey]: Correct.

App. M9.

Trial counsel's mistaken sentencing calculation resulted from his failure to fully investigate Petitioner's prior criminal history. Testimony at the hearing reflected that, in conversations with trial counsel, Petitioner had not recalled all of his prior misdemeanors. Trial counsel admitted at the hearing, however, that he failed to review Petitioner's full criminal record even though he had access to Petitioner's entire criminal record prior to the plea. App. M3-M4.

Had trial counsel taken the time to review Petitioner's prior record, he would have easily been able to determine that Petitioner had a prior record calculation of 50 points, which put Petitioner in Prior Record Category D, the highest category under the Michigan Sentencing Guidelines. There was also no ambiguity or dispute that the Offense Category for Petitioner's charge was Category IV. Thus, prior to the plea, trial counsel should have known, and could have advised Petitioner that he fell within Category D-IV, and thus faced a possible sentence of "180 to 300 months or life."

Petitioner acknowledged at the hearing that, after his plea but before sentencing, he received a copy of a Presentence Investigation Report ("PSIR"). App. M15-M16. The PSIR listed the correct guideline range of "180 to 300 months or life." It also contained a recommendation from the Probation Department that "Defendant be sentenced to serve a prison term of 20 to 80 years in the State Prison of Southern Michigan with credit for 48 days." App. M17-M18.

Questioned at the hearing regarding the impact of the statements contained in the PSIR, Petitioner testified that the guideline range listed on the presentence report "didn't have any impact because I was just under the assumption that's what the charge *carried*, that's why it was there. Not that's what my sentencing guidelines were going to be because I was under the assumption that 8 to 20 [years] would be my guidelines." App. M16. Petitioner further testified that he asked his defense counsel about the probation department's recommendation of 20 to 80 years, and counsel "informed me that they would recommend whatever they wanted, but under the bargain that we had, that's what they would be going for [8-20 years]." App. M16-M20.

On February 9, 1998, the state trial court issued a ruling from the bench denying Petitioner's motion to withdraw his plea. First, the trial court held that trial counsel's performance did not fall below the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The trial court noted that "Mr. Tracey acknowledged that there was some discussion about that guideline range [of 8 to 20 years]," but counsel was not ineffective because "there was no *promise* made by Mr. Tracey or the Prosecutor that the guideline range was going to be the 8 to 20 years." App. N6-N7 (Order Denying Motion to Withdraw Plea).

The trial court also found that "[a]ny incorrect preliminary scoring of the guidelines" by Mr. Tracey was "based on a mischaracterization of his prior record by Mr. Mix to his . . . counsel." App. N8. The court's reference to a "mischaracterization of his prior record" apparently refers to the trial court's observation that Petitioner was unable to "recall all of his prior criminal record" during his conversations with trial counsel. App. N7. The trial court failed to address whether trial counsel had any duty independently to determine Petitioner's criminal record before advising him regarding the likely sentence.

Second, the state trial court held that Petitioner's plea was not invalid. The Court noted that "interestingly enough there was no indication on the no-contest plea record of . . . whether there was, or was not, an agreed upon guideline range for this offense," but nevertheless found Petitioner's plea to be "knowingly" entered. The trial court reasoned that "Mr. Mix is a person who, because of his prior contact with the criminal justice system, is not unfamiliar with the – with the processes of the criminal justice system including offering a plea of guilty and the Michigan sentencing guidelines." App. N5-N6. In addition, the court found that, by the time Petitioner was sentenced, he should have been aware that the applicable guideline range was "significantly higher than 8 to 20 [years]," because the Presentence Investigation Report indicated a range of "180 to 300 months or life," but Petitioner failed to object. *Ibid.* Further, the trial court reasoned that the court itself had cited the correct range at the sentencing. Thus, the state trial court held that Petitioner's "assertion that he was promised or had a reasonable belief that the guideline ranges were, in fact, going to be eight to twenty. The Court finds those assertions by the Defendant made at the hearing on this matter to be not credible." App. N7.

In short, the trial court put the burden on Petitioner to (1) disregard his own attorney's advice, (2) independently understand the law and the true sentencing range, and (3) object at the sentencing hearing, all based on information provided to Petitioner after he had already entered his no contest plea.

Petitioner's subsequent appeals to the Michigan Court of Appeals and Michigan Supreme Court were denied without comment on the merits. App. F1 and G1.

B. Federal District Court Proceedings.

After exhausting his state court remedies, Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, pursuant to 28 U.S.C. § 2254. Petitioner argued that he had received ineffective assistance of counsel as a result of trial counsel's admitted failure to properly calculate the applicable sentencing range and that his plea was involuntary because he did not understand that he faced a life sentence.

The District Court denied the petition on July 20, 2001. App. D1. First, the District Court rejected Petitioner's claim that he received ineffective assistance of counsel, finding that counsel's performance did not fall below the standard set out by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The District Court acknowledged that Attorney Tracey had testified at the hearing that a guidelines range of eight to twenty years "may have been discussed." App. D13. The District Court also acknowledged that "prior to accepting Petitioner's plea, the state trial court informed Petitioner that the plea agreement confined the court to the sentencing guidelines. He further informed Petitioner that if he ***exceeded*** the guidelines, Petitioner would have an opportunity to withdraw his plea." App. D11. The District Court also acknowledged that "[n]either the trial court nor

either of the attorneys mentioned during the plea hearing what the specific guidelines would be." *Ibid.* Nevertheless, the District Court held that trial counsel's assistance was not ineffective because Petitioner "saw the presentence report prior to sentencing," and because "during the sentencing hearing, the trial judge stated that the [correct] sentencing guidelines were 15 to 25 years or life imprisonment." App. D11-D12.

Second, the District Court rejected Petitioner's contention that his plea was not made "with sufficient awareness of the relevant circumstances and likely consequences," as required by this Court's decision in *Brady v. United States*, 397 U.S. 742 (1970). The District Court held that the state trial court's application of *Brady* was not unreasonable in light of its findings that: (1) "Petitioner was silent during the plea hearing regarding his expectation of an 8 to 20 year sentence," (2) Petitioner "saw the presentence report which correctly noted the guidelines range as being 15 to 25 years to life imprisonment," (3) "Petitioner [at the sentencing hearing] did not mention the discrepancy between his supposed expectation of 8 to 20 years and the guidelines range of 15 to 25 years to life," and (4) Petitioner "waited approximately ten months after sentencing to file his motion to withdraw his plea." App. D17-D18.

Like the state trial court, the District Court put the burden on Petitioner to (1) disregard his own attorney's advice, (2) independently understand the law and the true sentencing range, and (3) object at the sentencing hearing, all based on information provided to Petitioner after he had already entered his no contest plea.

Following its decision, the District Court issued a Certificate of Appealability pursuant to 28 U.S.C. Section

2253(c)(1), and Petitioner appealed to the United States Court of Appeals for the Sixth Circuit.

C. Sixth Circuit Proceedings.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, arguing again that he received ineffective assistance of counsel and that his plea was invalid because it was not made knowingly with a full understanding of the consequences.

The Sixth Circuit affirmed the District Court's decision on May, 22, 2003. First, with regard to the ineffective assistance of counsel claim, the Sixth Circuit conceded that "Tracey may have miscalculated the guidelines range and instructed Mix that he was subject to an eight-to twenty-year range[.]" App. B9. The Sixth Circuit also conceded that "it would have been preferable for Tracey to verify Mix's criminal record[.]" *Ibid.* Nevertheless, the Sixth Circuit held that "his failure to do so d[id] not fall outside the wide range of reasonable representation." App. B10. The Sixth Circuit relied on a Tenth Circuit decision which held that "[a] miscalculation or erroneous sentence estimation by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel." App. B10 (quoting *United States v. Gordon,* 4 F.3d 1567, 1570 (10th Cir. 1993)).

The Sixth Circuit also held that, even if defense counsel's assistance had been ineffective, Petitioner could not show "prejudice" as required by the second prong of *Strickland.* App. B10. The Sixth Circuit reasoned that "[s]ince Mix did not attempt to withdraw his plea after he was clearly on notice of the actual guidelines range, it is unlikely that he would have declined the plea offer if not for Tracey's alleged misstatements." *Id.*

Second, the Sixth Circuit held that Petitioner's plea was valid. The Sixth Circuit noted that this Court's decision in *Boykin v. Alabama*, 395 U.S. 238 (1969), requires "an affirmative showing [on the record] that [the] plea is intelligent and voluntary," and that this Court's decision in *Brady v. United States*, 397 U.S. 742 (1970), requires that defendant have "sufficient awareness of the relevant circumstances and likely consequences" of the plea. The Sixth Circuit also noted that under *Mabry v. Johnson*, 467 U.S. 504, 508-09 (1984), "where 'the defendant was not fairly apprised of [a plea agreement's] consequences,' it can be attacked under the Due Process Clause." App. B11.

The Sixth Circuit held, however, that "the State court's finding that [Petitioner's] plea was valid was not an objectively unreasonable application of Supreme Court authority" because "the trial court explained to [Petitioner] at the plea proceeding that the offense 'carrie[d] up to life or any term of years'," and "then explained the *actual* sentencing guidelines range to Petitioner *at [the] sentencing*," yet Petitioner "failed to object." The Court also noted that Petitioner "saw the PSIR, that [] included the corrected guidelines range of 180 to 300 months or life, and that he had an opportunity to discuss it with his attorney, "but remained silent." App. B11-B12.

As with the District Court, the Sixth Circuit effectively held that Petitioner was required to (1) disregard his own attorney's advice, (2) independently understand the law and the true sentencing range, and (3) object at the sentencing hearing, all based on information provided to Petitioner after he had already entered his no contest plea.

Petitioner filed a Petition for Panel Rehearing and Rehearing En Banc, which was denied by the Sixth Circuit on July 22, 2003.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision conflicts with numerous decisions in other circuits. At least five other circuits have held that trial counsel's mischaracterization of the potential sentence – such as the gross mischaracterization that occurred here – constitutes ineffective assistance of counsel and renders a criminal defendant's plea constitutionally invalid. At least four other circuits have held that an otherwise invalid plea cannot be cured when the defendant later receives accurate sentencing information in a presentence report.

Furthermore, the Sixth Circuit's analysis improperly requires the criminal defendant to disregard his own attorney's advice, make an independent determination about what the sentencing range is, and object at sentencing, despite the advice his attorney has provided. This analysis requires a criminal defendant to act as his own counsel, despite the Constitution's guarantees of due process and effective assistance of counsel.

A. Defense Counsel's Gross Mischaracterization Of The Defendant's Potential Sentence Constitutes Ineffective Assistance Of Counsel And Renders A Plea Constitutionally Invalid.

In affirming the District Court's denial of habeas relief to Petitioner, the Sixth Circuit held that "[a] miscalculation or erroneous sentence estimation by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel." App. B10 (quoting *United States v. Gordon,* 4 F.3d 1567, 1570 (10th Cir. 1994)). This holding conflicts with numerous decisions from at least five other circuits:

D.C. Circuit. In *United States v. Booze*, 293 F. 3d 516, 518 (D.C. Cir. 2002), the D.C. Circuit held that "a

lawyer who advises his client whether to accept a plea offer falls below the threshold of reasonable performance if the lawyer makes a 'plainly incorrect' estimate of the likely sentence due to ignorance of applicable law of which he 'should have been aware.'"

Second Circuit. In *United States v. Gordon*, 156 F. 3d 376 (2nd Cir. 1998), the Second Circuit held: "By ***grossly*** underestimating [defendant's] sentencing exposure in a letter to his client, [counsel] breached his duty as a defense lawyer in a criminal case 'to advise his client fully on whether a particular plea to a charge appears desirable.' Therefore, we agree with the District Court in finding that [the attorney's] legal assistance 'fell below the prevailing professional norms' for advising a client during plea negotiations of his maximum exposure to imprisonment at sentencing." *Gordon*, 156 F.3d at 380 (emphasis added) (citations omitted). *See also Cullen v. United States*, 194 F. 3d 401, 404 (2nd Cir. 1999) (holding that failure to give "any advice concerning [the desirability of] the plea bargain and the significantly inaccurate calculation of sentencing ranges upon a plea and upon conviction after trial . . . was plainly deficient.").

Fourth Circuit. In *O'Tuel v. Osborne*, 706 F. 2d 498 (4th Cir. 1983), the Fourth Circuit held that counsel's "gross misinformation" concerning parole eligibility caused defendant's involuntary plea of guilty, thereby warranting habeas relief.

Fifth Circuit. In *Teague v. Scott*, 60 F. 3d 1167, 1171 (5th Cir. 1995), the Fifth Circuit held that [f]ailing to properly advise the defendant of the maximum sentence that he could receive falls below the objective standard required by *Strickland*," reasoning that "[w]hen the defendant lacks a full understanding of the risks of going to trial, he is unable to

make an intelligent choice of whether to accept a plea or take his chances in court.".

See also Beckham v. Wainwright, 639 F. 2d 262, 267 (5th Cir.), *cert. denied*, 454 U.S. 1036 (1981) (stating that "it is . . . essential that [an] attorney advise a defendant of possible consequences" between negotiating a plea and going to trial); *United States v. Ridgeway*, 321 F. 3d 512, 514-515 (5th Cir. 2003) (holding that "we agree that, under § 2255, in the context of a [] plea, an attorney's failure to properly inform his client about his sentencing exposure may constitute ineffective assistance."); *Herring v. Estelle,* 491 F 2d 125, 128 (5th Cir. 1974) (holding that "if the quality of counsel's service falls below a certain minimum level, the client's guilty plea cannot be knowing and voluntary because it will not represent an informed choice. And a lawyer who is not familiar with the facts and law relevant to his client's case cannot meet that required minimum level.").

Ninth Circuit. In *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986), the Ninth Circuit held that "the gross mischaracterization of the likely outcome presented in this case, combined with the erroneous advice on the possible effects of going to trial, falls below the level of competence required of defense attorneys."

Here, trial counsel admittedly gave Petitioner a gross mischaracterization of the applicable sentencing range. Instead of 8 to 20 years, Petitioner actually faced, and was sentenced to, life in prison. Numerous courts have held that trial counsel's mischaracterization of a criminal defendant's potential sentence – such as the gross mischaracterization that occurred here – constitutes ineffective assistance of counsel and renders a criminal defendant's plea constitutionally invalid. The Sixth Circuit's decision in this case is in direct conflict with these decisions. This Court should accept

review in order to resolve the conflict on this important question of constitutional law.

B. The Sixth Circuit's Analysis Improperly Deprives A Criminal Defendant Of His Right To Rely On The Advice Of Counsel.

The Sixth Circuit also held that Petitioner was not prejudiced by his trial counsel's mistaken advice. The Sixth Circuit reasoned that Petitioner should have known the true sentencing range – despite the erroneous advice of his attorney – because the true sentencing range was disclosed in a presentence report provided to Petitioner after his plea, and because the trial court stated the true sentencing range at the sentencing hearing, again well after Petitioner had already pled no contest.

As an initial matter, this holding also conflicts with numerous decisions from at least four other circuits. In the context of Fed.R.Crim.Pro. 11 plea colloquies, for example, numerous courts have held that an otherwise invalid plea cannot be cured when the defendant later receives accurate sentencing information in a presentence report. *See, e.g., U.S. v. Goins*, 51 F.3d 400, 404 (4th Cir. 1995) ("Violations of Rule 11, however, cannot be cured by the presentence report."); *U.S. v. Bounds*, 943 F.2d 541, 546, n.4 (5th Cir. 1991) ("A written presentence report is not an adequate substitute for the advice clearly required by Rule 11"); *United States v. Padilla*, 23 F. 3d 1220, 122, n.2 (7th Cir. 1994) (presentence report received *after a plea* does not "abate the concern that such information was not provided to [the defendant] at the *crucial* time – *during the plea hearing*.") (emphasis added); *United States v. Hourihan*, 936 F. 2d 508, 510, N.3 (11th Cir. 1991) (a Rule 11 violation is not harmless where defendant became aware of the mandatory minimum sentence only when she received the presentence report).

Even assuming that Petitioner should have known the actual sentence he faced, Petitioner clearly did not receive such information until after his plea.

More importantly, the state trial court, the District Court, and the Sixth Circuit effectively required Petitioner to act as his own attorney and deprived him of the right to rely on the advice of counsel. According to the courts below, Petitioner should have known that his attorney mistakenly calculated the sentencing range because Petitioner received a presentence report – after his plea – that contained the true sentencing range. Petitioner was then charged with the responsibility of casting aside his attorney's advice and objecting at the sentencing hearing, despite the trial court's own representation that Petitioner could withdraw his plea if the court "exceeded" the applicable guideline range.

This Court's precedent is clear, however, that Petitioner had the right to rely on the advice of his counsel. This Court has stated that "[t]he long-standing test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). "[A]n intelligent assessment of the relative advantages of pleading is frequently impossible without the assistance of an attorney." *Brady v. United States*, 397 U.S. 742, 748 (1970). For this reason, "defendants facing felony charges are entitled to the *effective* assistance of *competent* counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (emphasis added).

Put simply, the constitutional right to effective assistance of counsel, and the right to be subjected to a sentence only upon a voluntary and knowing waiver of the right to trial, are meaningless if a criminal defendant is required to act as his own counsel in determining the

applicable sentence he might face. Here, in conflict with the United States Constitution and this Court's precedent, Petitioner was charged with the responsibility of acting as his own trial counsel.

Furthermore, the approach adopted by the courts below is simply unworkable. It is not clear how a court is to conduct an analysis of ineffective assistance of counsel or involuntary plea claims in future cases. What type of information is sufficient to put a criminal defendant on notice that his attorney has erred? At what point is a criminal defendant charged with the duty of disregarding his own attorney's advice? What duty does the trial court have to place sufficient colloquy on the record to ensure that the defendant has not been improperly advised regarding his likely sentence?

If the Sixth Circuit's decision is allowed to stand, it will simply encourage criminal defendants to make objections at virtually every stage of a criminal proceeding regardless of the advice of counsel. A criminal defendant who does not make such objections runs the risk of being held responsible for his attorney's gross errors.

In sum, as required by this Court's precedent, the focus should be on the quality and nature of the assistance provided by counsel. Petitioner's trial counsel admittedly failed to advise Petitioner that he faced a life sentence. Instead of 8 to 20 years, Petitioner was sentenced to life. The burden should not have been placed on Petitioner to act as his own counsel. This Court should accept review of this case in order to decide these important questions of constitutional law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM R. CASE
Counsel of Record

MICHAEL N. BEEKHUIZEN
EVA C. GILDEE
SCOTT A. CAMPBELL
Attorneys

Thompson Hine LLP
10 West Broad Street
Columbus, Ohio 43215-3435
(614) 469-3200

Counsel for Petitioner
Thomas A. Mix

OCTOBER 2003.

Table of Appendix Contents

U.S. COURT OF APPEALS - 6TH CIRCUIT:

Order [Denying Rehearing],
filed 07/22/03 ..... A1-A2

Opinion [not for publication],
filed 05/22/03 ..... B1-B13

U.S. DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION :

Order Granting Certificate of
Appealability and Application
to Proceed *In Forma Pauperis,*
filed 8/21/01 ..... C1-C2

Opinion and Order Denying
Petition for Writ of *Habeas Corpus*,
filed 7/20/01 ..... D1-D18

Judgment,
filed 07/20/01 ..... E1-E1

MICHIGAN SUPREME COURT:

Order,
filed 06/02/99 ..... F1-F1

COURT OF APPEAL, STATE OF MICHIGAN:

Order,
filed 06/26/98 ..... G1-G1

AMENDMENTS - U.S. CONSTITUTION:

Sixth Amendment H1-H1

Fourteenth Amendment,
Due Process Clause I1-I1

STATUTES:

Federal Statute 28 U.S.C. § 2254 ..... J1-J4

OTHER - TRANSCRIPT:

**Felony Plea Hearing,
held 2/21/97 ..... K1-K11**

**Felony Sentencing,
held 3/24/97 ..... L1-L14**

**Hearing, Motion to Withdraw
No Contest Plea and For New Trial,
held 2/2/98 ..... M1-M25**

**Court Ruling on Hearing on Motion
to Withdraw No Contest Plea and
For New Trial,
held 2/9/98 ..... N1-N14**

FILED
Jul 22, 2003
Leonard Green,
Clerk

Case Nº 01-2122

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS A. MIX,	)	
Petitioner-Appellant,	)	
v.	)	**ORDER**
	)	
KENNY ROBINSON, WARDEN,	)	
Respondent-Appellee.	)	

BEFORE: DAUGHTREY and GIBBONS, Circuit Judges; and MILLS*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

* Hon. Richard Mills, Senior United States District judge for the Central District of Illinois, sitting by designation.

B - 1

FILED
May 22, 2003
Leonard Green,
Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Case No 01-2122

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Thomas Arthur Mix,
Petitioner-Appellant,
v.
KENNY ROBINSON, WARDEN,
Respondent-Appellee.

Before DAUGHTREY and GIBBONS, Circuit Judges; and MILLS, District Judge.

JULIA SMITH GIBBONS. Petitioner-appellant Thomas Mix pleaded *nolo contendere* in Michigan state court to a charge of assault with intent to murder, pursuant to a plea agreement providing that he would be sentenced in accord with the Michigan Sentencing Guidelines. He received a life sentence. Mix later attempted to withdraw his plea, arguing that his counsel had misinformed him about the applicable guideline range. The state trial court held an evidentiary hearing on the issue and determined that Mix's plea was valid. After exhausting his remedies in state court, Mix sought federal habeas relief, arguing that his plea was invalid and his counsel was constitutionally ineffective. The district court denied relief. For the following reasons, we affirm.

I.

The district court summarized the facts of the offense as follows:

> Petitioner's conviction arises out of events that occurred during the early morning hours of February 25, 1995. On the evening of February 24, 1995, Petitioner and his live-in girlfriend Paula Caballero spent a number of hours at a local bar. Around 2:30 a.m. on February 25th, they left the bar to return home. As they were driving home, Petitioner and Caballero began arguing. They returned home, went into their apartment and continued arguing. A short time later, Petitioner left the apartment and got into his Chevrolet Blazer. Caballero went outside and climbed into the vehicle to try to convince Petitioner not to leave. She then saw a bottle of gin on the floor of the car and feared that if Petitioner left with it in the car he would drink the whole bottle. She realized they weren't going to reconcile, so she took the bottle of gin, hopped out of the car, and smashed the bottle of gin in the driveway.
>
> Caballero then turned to walk back across the grass toward the apartment's front porch steps. As she was walking to the porch, she heard tires squealing. She turned around and saw the Blazer headed toward her. Caballero was struck by the Blazer, which Petitioner was driving. Petitioner got out of the car, told Caballero he was sorry and that he had not meant to hurt her. He went to a downstairs neighbor and asked him to call 911. Petitioner left the scene before the police arrived.

> Caballero's neck was broken. She is paralyzed from the chest down.

Mix entered a plea of *nolo contendere* in Berrien County Trial Court in Michigan on March 6, 2000, pursuant to a plea agreement. At his plea proceeding, Mix stated that it was his choice to plead no contest. The state court judge stated, "I advise you, sir, that this is a felony. It carries up to life or any term of years. Do you under-stand?" Mix responded affirmatively. The agreement provided that the prosecutor would dismiss two supplemental charges and recommend that the court sentence Mix in accord with the Michigan Sentencing Guide-lines. Mix stated that he understood that this was the entire plea agreement. He also stated that he understood that he was giving up any claim that the plea was a result of promises or threats that were not disclosed at the plea proceeding. Neither the prosecutor nor Mix's attorney, James Tracey, was aware of any promises, threats, or inducements to plead other than those disclosed on the record. Finding the plea to be "knowing and voluntarily and understandingly offered" and finding a sufficient factual basis for the plea from the Preliminary Examination transcript, the trial court accepted the plea.

Mix was sentenced on March 24, 1997. The court stated that the guidelines range was 180 to 300 months or life. Both Tracey and the prosecutor agreed with that calculation. The court then gave Mix an opportunity to speak. Although he offered a statement, Mix did not dispute the guidelines range or seek to withdraw his plea.

The trial court then sentenced him to life imprisonment. Mix had not protested his possible sentence in any way between the plea hearing and sentencing.

Mix moved to withdraw his plea approximately ten months after sentencing, alleging that it was not made knowingly because Tracey had told him that his guidelines range would be eight to twenty years. The trial court held an evidentiary hearing on this motion on February 2, 1998.

At the hearing, Tracey testified that he attempted to compute the sentencing guidelines range before the plea was entered, but that Mix's record was not completed until the presentence investigation report (PSIR) was available. Although either Tracey or Tracey and the prosecutor together came up with an estimate of the guidelines range, Tracey could not recall the estimate. He stated that, "I remember I think the computations that were made were different than what was eventually put forth in the presentence reports." Tracey also admitted to telling the prosecutor that he was unsure of the extent of Mix's prior record when he first estimated the guidelines range, because Mix had minimized his record in discussions with Tracey. After the plea was entered, Tracey told Mix that the guidelines sentence might rise to the level of a life sentence. Tracey did not specifically remember discussing the possibility of a life sentence with Mix before the plea was entered.

However, Tracey did review the PSIR, including the actual guidelines range, with Mix after the plea entry and prior to sentencing. The PSIR contained prior

convictions that Mix had not recalled when he discussed his record with Tracey. Tracey did not recall Mix being surprised by the guidelines range in the PSIR or asking to withdraw his plea. Although Mix objected to some portions of the PSIR, Tracey did not recall Mix objecting to how the guidelines range was calculated. Tracey also did not recall Mix's having any difficulty understanding the guidelines calculations when they were explained to him.

Mix also testified at the evidentiary hearing. He stated that when Tracey first told him about the plea agreement offer, he said that "8 to 20" years would be the guidelines range. Mix said that Tracey was "pretty firm" on the guidelines range. Mix denied that Tracey explained to him how the guidelines range was calculated. Mix admitted that he saw the PSIR (indicating the guidelines range of 180 to 300 months or life) before sentencing, but stated that he and Tracey never discussed it. He said that "[i]t didn't have any impact because I was just under the assumption that's what the charge carried," not what the sentencing guidelines would be. Mix denied understanding his sentence would be based on the 180 to 300 months or life range. He acknowledged that the eight to twenty-year range did not appear anywhere in the PSIR.

Mix also admitted that he did not raise the issue at sentencing, even though he heard Tracey stipulate that the sentencing range was 180 to 300 months or life and the court gave him an opportunity to speak. He stated that he assumed that everyone was aware of the eight to twenty-year range, and that the life sentence was "a big enough

blow" that he could not comprehend it. Mix also testified that he said something to Tracey about the eight to twenty-year after sentencing and tried to talk to the judge, but was taken to jail.

After hearing the evidence, the court ruled from the bench. It noted that Tracey had been an attorney for thirteen years in Michigan, and that Mix, because of his prior criminal history, also was familiar with the process of entering a plea. The court found that there was no promise to Mix, by Tracey or anyone else, that the guidelines range for his plea would be within a certain range. Further, the court accepted testimony that, at the time Tracey calculated the eight to twenty-year estimate, he was not aware of Mix's entire criminal history because Mix had not been able to recall all of his prior convictions. The court stated, "Any incorrect preliminary scoring of the guidelines was based on a mischaracterization of his prior record by Mr. Mix . . . to his counsel."

The court rejected as false Mix's claims of an alleged promise or understanding that the guidelines range would be eight to twenty years. At the time of the plea, Mix failed to indicate that he had been told anything about a guidelines range of eight to twenty years. Prior to sentencing, Mix had seen the PSIR stating the true guidelines range, but he failed to raise a concern about it either with his attorney or with the court. Therefore, the court found his assertions at the evidentiary hearing to be "not credible." It also held that Tracey's representation

was not constitutionally ineffective, and it denied Mix's motion to withdraw the plea..

Mix filed an application for appeal of the trial court's decision in the Michigan Court of Appeals, which denied leave to appeal for "lack of merit in the grounds presented." He then filed a delayed application for leave to appeal to the Michigan Supreme Court, which denied leave because it was "not persuaded that the questions presented should be reviewed by this court."

On August 27, 1999, Mix filed a *pro se* petition for writ of habeas corpus in the Eastern District of Michigan. On January 19, 2001, present counsel was appointed to represent Mix. On July 20, 2001, the district court denied Mix's habeas petition. It granted a certificate of appealability on August 21, 2001.

II.

The district court's denial of habeas relief is reviewed *de novo*. The Antiterrorism and Effective Death Penalty Act (AEDPA) applies to this case. Under 28 U.S.C. § 2254(d), a federal court should not grant habeas relief unless the adjudication in the state court proceedings:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light

> of the evidence presented in the State court proceeding.

Under the AEDPA, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). Rather, the issue is "whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409.

For habeas purposes, a federal court presumes that state court findings of fact are correct unless clear and convincing evidence is offered to rebut this presumption. 28 U.S.C. § 2254(e)(1); *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998). The appeals court gives complete deference to the federal district court's and state court's findings of fact supported by the evidence. *Clemmons v. Sowders*, 34 F.3d 352, 353 (6th Cir. 1994).

III.

A. Ineffective Assistance of Counsel Claim

Mix's first argument is that he was denied the effective assistance of counsel because Tracey misinformed him as to the consequences of his plea. The state court held an evidentiary hearing on this claim and found that Mix's allegations lacked credibility. Because no evidence has been offered to rebut the presumption of correctness of

the state court's factual findings, the state court's holding that Mix's counsel was not ineffective was not objectively unreasonable, and Mix is not entitled to habeas relief on this issue.

The Supreme Court has adopted a two-part test for determining whether a defendant received adequate assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). First, a defendant must show that his counsel's performance was deficient, which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The reviewing court should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Second, a defendant must show that counsel's deficient performance prejudiced the defendant. *Id.* at 687. In order to satisfy the "prejudice" requirement in a plea agreement context, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have plead guilty and "would have insisted on going to trial." *Hill v. Lockhart,* 474 U.S. 52, 59 (1985).

Specifically, Mix argued that Tracey was ineffective for failing to obtain Mix's criminal record, which led to his miscalculation and misinforming Mix of the guidelines range. However, the facts in this case do not support Mix's argument that Tracey was constitutionally ineffective. Mix entered a plea with an understanding that he would be sentenced within the guidelines, and neither

the judge nor the attorneys specified during the plea proceeding what the guidelines range would be. At the plea proceeding, the judge informed Mix that the offense carried up to a life sentence, and he stated that he understood. Tracey may have miscalculated the guidelines range and instructed Mix that he was subject to an eight to twenty-year range. However, the state court found that any miscalculation was a result of Mix's mischaracterizing his prior criminal history. While it would have been preferable for Tracey to verify Mix's criminal record, his failure to do so does not fall outside the wide range of reasonable representation. As the Tenth Circuit has stated, "[a] miscalculation or erroneous sentence estimation by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel." *United States v. Gordon,* 4 F.3d 1567, 1570 (10th Cir. 1994). That is particularly true where, as here, the alleged erroneous calculation was a result of the defendant's own omissions to counsel about his criminal record.

In any event, Mix cannot show the second *Strickland* prong of prejudice. In order to show prejudice, Mix must prove that he would have declined the plea agreement if not for Tracey's alleged errors. He has not done so. The record is clear that Tracey reviewed the presentence report, containing the correct guidelines range, with Mix before sentencing. He also testified that he explained the guidelines range to Mix at that time. At no time did Mix indicate that he wished to withdraw his plea. At sentencing, Mix heard the judge state the correct

guidelines range, heard his attorney agree, and failed to object when given an opportunity. Mix objected only some ten months after actually receiving the life sentence. Since Mix did not attempt to withdraw the plea after he was clearly on notice of the actual guidelines range, it is unlikely that he would have declined the plea offer if not for Tracey's alleged misstatements.

The state court's holding that Mix failed to demonstrate ineffective assistance of counsel was not an objectively unreasonable application of clearly established law. Mix is not entitled to habeas relief on this claim.

B. Validity of Plea

Mix's second, related claim is that his plea was invalid because he did not understand its consequences. A plea is constitutionally invalid unless it is accompanied by "an affirmative showing that it was intelligent and voluntary." *Boykin v. Alabama,* 395 U.S. 238, 242 (1969). The defendant must have "sufficient awareness of the relevant circumstances and likely consequences" of his plea. *Brady v. United States,* 397 U.S. 742, 748 (1970); accord *Hart v. Marion Correctional Inst.,* 927 F.2d 256, 257 (6th Cir. 1991). The Supreme Court has held that where "the defendant was not fairly apprised of [a plea agreement's] consequences," it can be attacked under the Due Process Clause. *Mabry v. Johnson,* 467 U.S. 504, 508-09 (1984).

As discussed, Mix testified that Tracey told him that the guidelines range would be eight to twenty years while he was deciding whether to accept the plea agreement. However, the trial court explained to Mix at the plea proceeding that the offense "carrie[d] up to life or any term of years." Mix stated that he understood and that no additional promises had been made to him to induce the plea. The trial court then explained the actual sentencing guidelines range to Mix at sentencing, and he failed to object. Mix admitted that he saw the PSIR, that it included the guidelines range of 180 to 300 months or life, and that he had an opportunity to discuss it with his attorney. The state court, after stating on the record that the guidelines range was 180 to 300 months or life, gave Mix an opportunity to speak, and he remained silent. The state court made the following findings:

> The Court does find that Mr. Tracey did discuss the guidelines ranges — on reviewing the presentence investigation report. That . . . report clearly shows the guideline ranges to be significantly higher than eight to twenty, or the alternative sentence of life. The Court finds as a matter of fact that the Defendant did not raise concern about the guideline ranges at the — at the time that he and Mr. Tracey discussed the presentence investigation report several days before the actual sentencing in this matter. And, of course, the Defendant did not raise this issue during allocution or otherwise, even after the Court specifically indicated to him — indicated to his counsel and him before proceeding to

> sentence what the guidelines were as calculated by the Court.

These factual findings are presumed correct under § 2254 (e)(1), and they believe Mix's claim that he believed that the plea agreement called for a specific sentence. Therefore, the state court's finding that Mix's plea was valid and was not an objectively unreasonable application of Supreme Court authority.

IV.

For the foregoing reasons, we affirm the district court's denial of habeas relief.

FILED
Aug 21, 2001
Clerk's Office
U.S. Dist. Ct.,
Eastern Michigan

C-I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS ARTHUR MIX,
Petitioner,

v.

No. 99-CV-74244
The Honorable
Arthur J. Tarnow

KENNY ROBINSON, Warden,
Respondent.

ORDER GRANTING CERTIFICATE OF APPEALABILITY [34-1]
and
APPLICATION TO PROCEED *IN FORMA PAUPERIS* [35-1]

This matter is before the Court on Mr. Mix's Notice of Appeal from this Court's July 20, 2001 Opinion and Order denying his Petition for Writ of Habeas Corpus. An appeal may not be taken from the final order denying a motion filed pursuant to 28 U.S.C. § 2254 unless a Certificate of Appealability issues. 28 U.S.C. §2253(c)(1)(A). For a Certificate of Appealability to issue, the District Court must find that Petitioner has made, "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Petitioner's claims were reviewed by the Court, and were determined to lack merit sufficient to grant habeas relief. Mr. Mix's claims were not denied on procedural grounds.

The Court finds that Mr. Mix has made the necessary showing of the denial of his constitutional rights, in the two issues raised in his § 2254 Petition. The Court also finds that jurists of reason may determine that it was debatable whether this Court was correct in its ruling in denying Mr. Mix's Petition for Habeas Relief. Therefore, the Court certifies the following two issues for appeal:

I. Petitioner's *nolo contendere* plea to assault with intent to murder was not knowing, voluntary, and intelligent, as the result of the ineffective assistance of counsel.

II. Petitioner's plea of *nolo contendere* was not voluntary, knowing, and intelligent, and therefore was taken in violation of the Due Process Clause.

As such, Petitioner's Certificate of Appealability **(34-1) IS HEREBY GRANTED.**

Mr. Mix has also filed a Motion to Proceed on Appeal *In Forma Pauperis.* The Court has reviewed the petitioner's Motion and Brief in support of his Motion The Court is satisfied that Mr. Mix has met the requirements to proceed *in forma pauperis.* Therefore, Petitioner Mix's Motion to Proceed on Appeal *In Forma Pauperis* **[35-1] IS HEREBY GRANTED.**

/s/ Arthur J. Tarnow DATED: August 21, 2001
ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

FILED
Jul 20, 2001
Clerk's Office
U.S. Dist. Ct.,
Eastern Michigan

D-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS ARTHUR MIX,
Petitioner,

v.

Case Number: 99-74244
The Honorable
ARTHUR J. TARNOW

KENNY ROBINSON,
Respondent.

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

Petitioner Thomas Arthur Mix, a state inmate currently incarcerated in the Mound Correctional Facility in Detroit, Michigan, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the petition is denied.

II. Facts

Petitioner's conviction arises out of events that occurred during the early morning hours of February 25, 1995. On the evening of February 24, 1995, Petitioner and his live-in girlfriend Paula Caballero spent a number of hours at a local bar. Around 2:30 a.m. on February 25th, they left the bar to return home. As they were driving borne, Petitioner and Caballero began arguing. They returned home, went into their apartment and continued arguing. A short time later,

Petitioner left the apartment and got into his Chevrolet Blazer. Caballero went outside and climbed into the vehicle to try to convince Petitioner not to leave. She then saw a bottle of gin on the floor of the car and feared that if Petitioner left with it in the car he would drink the whole bottle. She realized they weren't going to reconcile, so she took the bottle of gin, hopped out of the car, and smashed the bottle of gin on the driveway.

Caballero then turned to walk back across the grass toward the apartment's front porch steps. As she was walking to the porch, she heard tires squealing. She turned around and saw the Blazer headed toward her. Caballero was struck by the Blazer, which Petitioner was driving. Petitioner got out of the car, told Caballero he was sorry and that he had not meant to hurt her. He went to a downstairs neighbor and asked him to call 911. Petitioner left the scene before the police arrived. Caballero's neck was broken. She is paralyzed from the chest down.

III. Procedural History

On February 21, 1997, Petitioner pleaded no contest in Berrien County Circuit Court to assault with intent to murder. Petitioner's no contest plea was made pursuant to a plea agreement whereby the prosecutor agreed to dismiss two supplemental charges and to recommend that the court sentence Petitioner within the sentencing guidelines range. On March 24, 1997, Petitioner was sentenced to life imprisonment.

On January 20, 1998, Petitioner filed a Motion for Withdrawal of No Contest Plea and for Evidentiary Hearing. The Court conducted a hearing on Petitioner's Motion on February 2, 1998. On February 9, 1998, the trial court issued an opinion from the bench denying Petitioner's Motion for Withdrawal of No Contest Plea.

Petitioner then filed a delayed application for leave to appeal to the Michigan Court of Appeals presenting the following claims:

> **I.** The trial court erred in denying defendant's motion for plea withdrawal, where it was not an understanding plea, where there was a bargain for a sentence within the guidelines, and where the defendant was misinformed by his counsel that the guidelines were 8 to 20 years.
>
> **II.** Defendant was denied effective assistance of counsel where trial counsel misled the defendant into a plea agreement by misinforming him, and by not ascertaining the guideline range, where the sentence bargain promised a guideline sentence; the plea was involuntary and invalid because defendant was unable to understand its consequences.
>
> **III.** Where the rationale for defendant's no contest plea was avoidance of civil liability, where civil liability had no significance for the

defendant and was used as a pretext for inducing a plea, and where defendant claimed innocence of intent to murder, the plea was neither voluntary nor accurate; and inducement of the "pretext" plea by counsel constituted ineffective assistance.

The Michigan Court of Appeals denied leave to appeal for "lack of merit in the grounds presented." People v, Mix, No. 210467 (Mich. Ct. App. June 26, 1998).

Petitioner next filed a delayed application for leave to appeal in the Michigan Supreme Court, which was also denied. People v. Mix, No. 112764 (Mich. June 2, 1999).

On August 27, 1999, Petitioner filed the pending petition for a writ of habeas corpus presenting the same claims presented on direct review in state court. On January 19,2001, this Court appointed Attorney R. Steven Whalen to represent Petitioner in this matter.

IV. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA") altered the standard of review federal courts must apply when reviewing applications for a writ of habeas corpus. The AEDPA applies to all habeas petitions, filed after the effective date of the act, April 24, 1996. Because petitioner's application was flied after April 24, 1996, the provisions of the AEDPA, including the amended standard of review, apply to this case.

As amended, 28 U.S.C. § 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. Franklin v. Francis, 144 F.3d 429 (6th Cir. 1998).

Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(c)(l)[1]; see also Cremeans v. Chapleau. 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous").

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases.
>
> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor. 120 S. Ct. 1495, 1519-20(2000).

With respect to the "unreasonable application" clause of § 2254(d)(1), the United States Supreme Court held that a federal court should analyze a claim for habeas corpus relief

---

[1]28 U.S.C. § 2254(e)(1) provides, in pertinent parts:
In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

under the "unreasonable application" clause when "a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." *Id.* at 1521. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable...
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.
>
> *Id.* at 1521-22.

With this standard in mind, the Court proceeds to the merits of the petition for a writ of habeas corpus.

V. Analysis

A. Exhaustion of State Court Remedies

Respondent argues that the petition should be dismissed because Petitioner has failed to exhaust his state court remedies with respect to his claim that his attorney was ineffective for failing to investigate a valid defense. In response, Petitioner argues that he is not raising the claim of failure to investigate as a separate, independent claim. He argues that he is instead presenting this claim as further evidence that counsel's advice regarding the plea was uninformed and therefore incompetent.

In the brief in support of his application for leave to appeal to the Michigan Court of Appeals, Petitioner presented the following argument:

> Despite Defendant's consistent denial of guilt, the attorney was unprepared for trial. He was evasive in his answers to repeated questions concerning strategy for trial preparation, intoxication as a defense, whether a medical doctor on intoxication or an accident reconstructionist could be employed and the lack of funds for such experts; he was completely vague as to any discussions he had with the defendant regarding degrees of guilt or possible pleas.

Petitioner's Brief at p. 13.

Petitioner presented the same argument in his application for leave to appeal to the Michigan Supreme Court. Thus, although the Michigan Court of Appeals and Michigan Supreme Court denied leave to appeal, Petitioner presented his failure to investigate claim on direct review. Accordingly, Petitioner has exhausted his state court remedies.

B. Ineffective Assistance of Counsel Claim

Petitioner claims that his attorney was ineffective for failing to accurately advise him regarding the terms of the plea agreement and failing to investigate potential defenses. The plea agreement called for the prosecutor to drop two supplemental charges and to recommend that the trial court sentence Petitioner within the guidelines. Petitioner claims that his attorney informed him that the guidelines range was eight to twenty years, when, in fact, the guidelines range was 15 to 25 years to life imprisonment. Further, Petitioner claims that his attorney failed properly to investigate the availability of certain defenses.

In Strickland v. Washington. 466 U.S. 668 (1984), the Supreme Court established a two- pronged test for determining whether a petitioner has received ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient, which "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. Second, a petitioner must show that counsel's deficient performance prejudiced petitioner. A

petitioner may establish prejudice by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.*

The Supreme Court emphasized that, when considering an ineffective assistance of counsel claim, the reviewing court should afford counsel a great deal of deference:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 689 (internal citations omitted).

The Court further explained that, to establish deficient performance, a petitioner must identify acts that were "outside the wide range of professionally competent

assistance." *Id.* To satisfy the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The Sixth Circuit, applying the Strickland standard, has held that a reviewing court therefore must focus on whether counsel's alleged errors "have undermined the reliability of and confidence in the result." McQueen v. Scroggy. 99 F.3d 1302, 1311 (6th Cir. 1996), *cert. denied* 520 U.S. 1257(1997).

The two-part Strickland test applies to claims of ineffective assistance of counsel based upon counsel's conduct prior to the entry of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). In the context of guilty pleas, the first half of the Strickland v. Washington test is the same standard set forth above. *Id.* The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Id.*

In the instant case, prior to accepting Petitioner's plea, the trial court judge informed Petitioner that the plea agreement confined the judge to the sentencing guidelines. He further informed Petitioner that if he exceeded the guidelines Petitioner would have an opportunity to withdraw

his plea. Neither the trial court judge nor either of the attorneys mentioned during the plea hearing what the specific guidelines would be.

During the sentencing hearing, the trial court judge stated that the sentencing guidelines were 15 to 25 years or life imprisonment. After the trial court judge advised Petitioner of the sentencing guidelines, but prior to pronouncement of the sentence, Petitioner had an opportunity to address the court. At that time, Petitioner did not mention any expectation that he would receive a sentence within a guidelines range of 8 to 20 years. The trial court judge then sentenced Petitioner to life imprisonment and properly advised him of his right to file an application for leave to appeal in the Michigan Court of Appeals.

Approximately ten months after sentencing, Petitioner filed a motion to withdraw his guilty plea. The trial court conducted an evidentiary hearing regarding Petitioner's motion to withdraw his plea during which Petitioner was represented by Attorney Alfred Millstein. Petitioner's former attorney James Tracey testified during the evidentiary hearing. He testified that he understood the plea agreement to be that, in exchange for Petitioner's plea of no contest to assault with intent to murder, the prosecutor would drop two supplemental charges and recommend a sentence within the guidelines. Attorney Tracey testified that an attempt was made to compute the sentencing guidelines prior to relaying the plea offer to Petitioner, but he could not recall whether that attempt was made by him or by the prosecutor. He also could not recall what guidelines calculation was reached.

Attorney Tracey acknowledged that a guidelines range of eight to twenty years may have been discussed. When asked whether he informed Petitioner prior to entry of the plea of the possibility that the guidelines range might be up to life in prison, Attorney Tracey could not recall whether he had done so. Attorney Tracey testified that he reviewed the pre-sentence report, which contained the correct guidelines range, with Petitioner prior to sentencing, and that he explained the guidelines range to Petitioner at that time. Attorney Tracey further testified that Petitioner did not indicate at any time that he wished to withdraw his plea.

Petitioner testified at the evidentiary hearing that, when he was considering whether to accept the plea agreement, Attorney Tracey incorrectly told him that his guidelines range would be 8 to 20 years. Petitioner acknowledged that prior to sentencing he reviewed the pre-sentence report, which correctly cited the sentencing guidelines as 15 to 25 years to life. Petitioner testified that he did not think that those guidelines were applicable to his case because his attorney told him the guidelines range was 8 to 20 years. Petitioner testified that when the trial judge sentenced him to life imprisonment he turned to his attorney to ask what had happened. Petitioner stated that Attorney Tracey told him because the judge had exceeded the guidelines, he could revoke his plea. Petitioner further stated that after he was taken from the sentencing courtroom he tried to consult with his attorney but was unable to do so, and that he subsequently attempted unsuccessfully five or six times to contact his attorney regarding the sentence.

The last state court to issue a reasoned opinion regarding the merits of Petitioner's ineffective assistance of counsel claim, the trial court, stated, in pertinent part:

> Attorney James Tracey was the retained attorney of record for the Defendant at times operative to the instant motion.... Ineffective assistance in the context of offering a plea, the appropriate focus on whether — what is whether the Defendant's plea was voluntarily, understandingly made....
>
> ....
>
> Was this plea understandingly made? Both the Defendant and Mr. Tracey indicated that they had gone over the potential sentencing guidelines here. Mr. Mix was of the mind that the guideline range was going to be approximately eight — was going to be eight years to twenty years. Mr. Tracey acknowledged that there was some discussion about that guidelines ranges, but the Court finds from the testimony that Mr. Tracey did not promise that those were — that was going to be the guideline range. And there is significant testimony, and the Court accepts it, that Mr. Tracey was not aware of the entire criminal history of the Defendant, nor had the Defendant at the time that they were discussing the potential of a plea, did Mr. Mix recall all of his prior criminal record. But most importantly there was no promise made by Mr. Tracey or the Prosecutor that the guideline range was going to be the eight to twenty years that the Defendant testified about at the hearing.

The Defendant also, at the time of the plea, did not indicate for the record that he had been told anything about the guideline range of eight to twenty at the time — neither at the time of the plea, nor at the time of sentencing. Accordingly, the Court finds his assertion that he was promised or had a reasonable belief that the guideline range were — were, in fact, going to be eight to twenty. The Court finds those assertions by the Defendant made at the hearing on this matter to be not credible.

The Court does find that Mr. Tracey did discuss the guideline ranges — [when] reviewing the pre-sentence investigation report. That pre-sentence investigation report clearly shows the guideline ranges to be significantly higher than eight to twenty, or the alternative sentence of life. The Court finds as a matter of fact that the Defendant did not raise a concern about the guideline ranges at the time — at the time that he and Mr. Tracey discussed the pre- sentence investigation report several days before the actual sentencing in this matter. And, of course, the Defendant did not raise this issue during allocution or otherwise, even after the Court specifically indicated to him — indicated to his counsel and him before proceeding to sentence what the guideline ranges were as calculated by the Court.

The Court finds that really, at bottom, this case concerns Defendant's dissatisfaction with the life sentence that I ultimately did give him. . . . Any incorrect preliminary scoring of the guidelines

> was based on a mischaracterization of his prior record by Mr. Mix to his — to his counsel. And when given the opportunity to indicate his dissatisfaction with the actual guideline range as the Court calculated it, Mr. Mix did not say anything to the Court.. . . At bottom it's the Court's opinion that this is a situation where Mr. Mix's hope for a lesser sentence went unfulfilled rather than any incompetence, if you will, or a threshold. The Court finds that the representation of Mr. Tracey met the standard of Strickland v. Washington.

Tr., 2/9/98, p. 4-8.

This Court finds that the trial court's decision was a reasonable application of Supreme Court precedent. While Attorney Tracey's recollection of his advice to Petitioner regarding the plea agreement was somewhat incomplete, Petitioner's contemporaneous conduct and his testimony during the evidentiary hearing support the trial court's holding. Petitioner testified during the evidentiary hearing that he saw the presentence report prior to sentencing. The presentence report clearly listed his sentencing guidelines as 15 to 25 years to life imprisonment. The presentence report also included a recommended sentence of 20 to 80 years imprisonment. Petitioner admitted that he failed to question Attorney Tracey regarding the recommended sentence or sentencing guidelines. He also admitted that he failed to question Attorney Tracey regarding the fact that a prison term of 8 to 20 years was not mentioned anywhere in the presentence report. Given this testimony, this Court

concludes that Petitioner has failed to establish that his attorney inadequately informed him regarding the terms of the plea agreement.

This Court concludes that the trial court's decision that Attorney Tracey provided effective assistance of counsel was not contrary to or an unreasonable application of Supreme Court precedent. Accordingly, Petitioner is not entitled to habeas corpus relief with respect to this claim.

C. Voluntariness of Plea

Petitioner also argues that he should have been permitted to withdraw his plea because it was involuntary. The Supreme Court has held that, to be valid, a guilty plea must be made voluntarily and intelligently. Brady v. U.S., 397 U.S. 742, 748-49 (1970). The plea must be made "with sufficient awareness of the relevant circumstances and likely consequences." Id. at 748. The voluntariness of a plea "can be determined only by considering all of the relevant circumstances surrounding it." Id. at 749.

Petitioner argues that his plea was involuntary because he did not understand the plea agreement. Following the evidentiary hearing, the trial court concluded that Petitioner's testimony that he understood the plea agreement to include a sentence of 8 to 20 years was not credible. A number of factors support the trial court's credibility determination. First, Petitioner was silent during the plea hearing regarding his expectation of an 8 to 20 year sentence. Second, Petitioner admitted during the evidentiary hearing

that, prior to sentencing, he saw the presentence report which correctly noted the guidelines range as being 15 to 25 years to life imprisonment. Third, at the sentencing hearing, Petitioner did not mention the discrepancy between his supposed expectation of 8 to 20 years and the guidelines range of 15 to 25 years to life. Finally, Petitioner waited approximately ten months after sentencing to file a motion to withdraw his plea.

Thus, considering all of the foregoing circumstances, the Court concludes that the trial court's holding that Petitioner's plea was voluntarily and knowingly made was not contrary to or an unreasonable application of Supreme Court precedent. Accordingly, Petitioner is not entitled to habeas corpus relief with respect to this claim.

VI. Conclusion

For the foregoing reasons, **IT IS ORDERED** that a writ of habeas corpus is **DENIED** and the matter is **DISMISSED WITH PREJUDICE.**

/s/ Arthur J. Tarnow
ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

DATE: July 20, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS ARTHUR MIX, # 216433
Petitioner,

v.

Case No. 99-74244
The Honorable
ARTHUR J. TARNOW

KENNY ROBINSON,
Respondent.

_____/

FILED
Jul 20, 2001
Clerk's Office
U.S. Dist. Ct.,
Eastern Michigan

JUDGMENT

In accordance with the Opinion and Order, entered this date, **IT IS ORDERED AND ADJUDGED** that the Petition for Habeas Corpus be, and hereby is, **DISMISSED WITH PREJUDICE.**

Dated at Detroit, Michigan this 20th day of July, 2001.

DAVID J. WEAVER
CLERK OF COURTS

By: /s/ C. Pickles
Deputy Clerk

Approved:
/s/ Arthur J. Tarnow
ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

Order
Entered: June 2, 1999

Michigan Supreme Court
Lansing, Michigan

112764

Elizabeth A. Weaver,
Chief Justice

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff - Appellee,

v

THOMAS ARTHUR MIX,
Defendant - Appellant.

SC: 112764
COA: 210467
LC: 96-003318-FC

On order of the Court, the delayed application for leave to appeal from the June 26, 1998 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh, J., would remand to the Court of Appeals as on leave **granted.**

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certified that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 2, 1999

/s/ Corbin R. Davis
Clerk

Court of Appeals
State of Michigan

Order

People of Michigan v. Thomas Arthur Mix

Docket No 210467

LC No96-003318 FC

The Court orders that the delayed application for leave to appeal is **DENIED** for lack of merit in the grounds presented.

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

June 26, 1998
Date

/s/ Carl L. Gromek
Chief Clerk

TEXT OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

TEXT OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold

an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATE OF MICHIGAN
IN THE BERRIEN COUNTY TRIAL COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

v. **Case No. 96-3318-FC-M**

THOMAS ARTHUR MIX,
Defendant.

FELONY PLEA

BEFORE THE HONORABLE PAUL L. MALONEY,
TRIAL JUDGE

Niles, Michigan - Friday, February 21, 1997

APPEARANCES:

For the People: HENRY W. RUIS (P35118)
South County Building
1205 North Front Street
Niles, MI 49120
(616) 687-1294

For the Defendant: JAMES J. TRACEY (P37723)
603 East Main Street
Niles, MI 49120
(616) 684-777

Niles, Michigan

Friday, February 21, 1997 - 2:20 p.m.

THE COURT: This is a file number 96-3318-FC-M, the People of the State of Michigan versus Thomas Arthur Mix.

Are you that person, sir?

THE DEFENDANT: Yes, I am.

THE COURT: Mr. Mix is before the Court with his attorney Mr. James Tracey. The Prosecutor is Mr. Ruis.

Gentlemen, I understand that the Defendant wishes to offer a plea. Is this correct?

MR. TRACEY: That's correct, Judge.

THE COURT: And what plea does he wish to offer?

MR. TRACEY: No contest to the charge.

THE COURT: All right. This is pursuant to a plea agreement, I take it?

MR. RUIS: It is, your Honor.

THE COURT: All right. Mr. Mix, is that your understanding, sir? You wish to offer a plea of no contest the charge of Assault With Intent to Murder?

THE DEFENDANT: Yes, I do.

THE COURT: All right. Is it your choice, sir, to plead no contest?

THE DEFENDANT: Yes. Mr. Mix, in order to take a no contest plea from you, sir, I must place you under oath.

Transcript Page 4

affirm to tell the truth, the whole truth and nothing but the truth, this you do under the pains penalties of perjury?

THE DEFENDANT: Yes, I do.

THE COURT: All right. Mr. Mix, how old are you?

THE DEFENDANT: Twenty-eight.

THE COURT: And how far did you go in school?

THE DEFENDANT: Through the 12th grade.

THE COURT: Are you able to read and write the English language, sir?

THE DEFENDANT: Yes.

THE COURT: Have you taken any prescription medication, alcohol or any other substance which might affect your ability to understand what is occurring here today?

THE DEFENDANT: No.

THE COURT: Do you understand what I am saying to you?

THE DEFENDANT: Yes.

THE COURT: If at anytime, Mr. Mix, you have any questions, I want you to ask me. Do you understand?

THE DEFENDANT: Yes.

THE COURT: All right, sir. The charge against you is that on or about February 25, 1996 at 221 North 6th Street in the City of Niles, Berrien County, Michigan, you did make an assault upon Paula Caballero, C-A-B-A-L-L-E-R-O, with intent to commit the crime of murder. Do you understand the charge?

THE DEFENDANT: Yes.

Transcript Page 5

THE COURT: I advise you, sir, that this is a felony. It carries up to life or any terms of years. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed this case with your attorney, Mr. Tracey, and has he fully advised you of your rights?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with his work and the representation of you up until now?

THE DEFENDANT: Yes.

THE COURT: All right. Now, Mr. Mix, if you plead no contest to this charge and I accept your plea, you will not have a trial of any kind and you will be deliberately giving up all the rights that you would have if your case went to trial. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand, sir, that by pleading no contest to this charge and I accept the plea, a conviction for this offense will be entered against you. Do you understand?

THE DEFENDANT: Yes.

THE COURT: By pleading no contest, sir, you will be giving up all of the following rights. First, the right to a trial by a jury of 12 persons and the right to have your attorney present at that jury trial defending you. Do you understand?

THE DEFENDANT: Yes.

THE COURT: You also would give up the right, sir, to be tried by the Court, that is, by the judge alone without a jury, if you choose and the prosecutor and the court consent. And you further give up your right to have your attorney present at that non-jury trial defending you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Likewise, sir, you would give up the right to presume innocent until proven guilty and the right to have the prosecutor prove each element of the charge beyond a reasonable doubt that you are guilty. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You would also be giving up the right, sir, to have the witnesses against you appear at the trial and the right to be present during those witnesses testimony and the right to question and cross-examine the witnesses who testify against you. All three of those rights you also give up. Do you understand?

THE DEFENDANT: Yes.

THE COURT: You would also be giving up the right, sir, to have the court order any witnesses that you have for your defense to appear at trial. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You would also give us the right, sir,

remain silent and not testify during the trial and not have that silence mentioned or used against you in any way. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And, likewise, sir, you give up the right to testify at the trial if you wish. Do you understand?

THE DEFENDANT: Yes.

THE COURT: Now, Mr. Mix, do you understand each of those rights as I have just explained them to you?

THE DEFENDANT: Yes.

THE COURT: If you plead no contest, sir, and I accept the plea, you will not have a trial of any kind and you will be deliberately giving up all of those rights. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Likewise, sir, if you plead no contest and you are sentenced as a result of that plea and decide to appeal your case to the Michigan Court of Appeals, the Michigan Court of Appeals would not have to hear your appeal. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Are you currently on probation or parole for any other offense?

THE DEFENDANT: No, sir.

THE COURT: Counsel, is there a plea agreement?

Transcript Page 8

MR. RUIS: There is, Judge. In exchange for the Defendant's plea, the People agree to dismiss the 2 pending supplemental charges currently filed on the Information before the Court. And at the time of sentencing, the People are going to recommend to the Court that the Court stay within the Michigan Sentencing Guidelines.

THE COURT: All right. Mr. Tracey, is that the plea agreement?

MR. TRACEY: This is the plea agreement.

THE COURT: All right. Mr. Mix, is that the entire agreement, sir, as you understand it?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Mr. Mix, if the Court accepts your plea, you will be giving up any claim that the plea was a result of promises or threats which do not disclose to me here today. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Likewise, sir, if the Court accepts your plea, you will be giving up any claim that is it not your own choice to enter the plea of no contest. Do you understand?

THE DEFENDANT: Yes.

THE COURT: Now, Mr. Mix, has anyone used any other promises or force or fraud or tricks of any kind to get you to plea no contest here today?

Transcript Page 9

THE DEFENDANT: No, sir.

THE COURT: Counsel, either of you aware of any promises, threats or adducements other than those already disclosed on the record?

MR. RUIS: I haven't, Judge.

MR. TRACEY: None, your Honor.

THE COURT: The record should show that this Court has had no participation in either the plea agreement or any possible sentence in this matter.

Now, Mr. Mix, to the extent that the plea agreement between the Prosecutor's Office and you confines me to the Michigan Sentencing Guidelines. If I decide to exceed the Sentencing Guidelines, you would have an opportunity, sir, to withdraw your plea. Number one, I would inform you of that. I would inform you of the specific sentence that I intended to give and under those circumstances, you would have a right to withdraw your plea of no contest if you wanted to. Do you understand?

THE DEFENDANT: Yes.

THE COURT: All right. Now, gentlemen, this is a plea of no contest. The Court must satisfy itself if there is a reason sufficient under the law for a no contest plea and I also need some indication of what I can use for a factual basis for the plea. Mr. Ruis?

MR. RUIS: Judge, I believe the reason for the plea

potential civil liability. And with regard to the factual basis, it is my understanding that I don't believe the Defense has any objection that the Court consider the Preliminary Examination transcript.

THE COURT: All right, thank you, Mr. Ruis.

Mr. Tracey, do you agree that the purpose of the no contest plea is for avoidance of possible civil liability and may I use the Preliminary Examination transcript of a Preliminary Examination held in this matter before the Honorable Lynda Tolen on August 20, 1996?

MR. TRACEY: That's an accurate statement, Judge, and you may use the preliminary exam transcript.

THE COURT: All right, thank you.

Mr. Mix, having heard all of the rights an representations placed on the record, how do wish to plead to the charge of Assault With Intent to Commit Murder?

THE DEFENDANT: No contest.

THE COURT: Are you pleading no contest, sir, solely because it is your own choice and you do not wish to contest the charges?

THE DEFENDANT: Yes, sir.

THE COURT: All right. The Court has reviewed the Preliminary Examination transcript on the Preliminary Examination held before Judge Tolen on August 20, 1996. A review of that Preliminary Examination transcript in its

entirety, I find that there is sufficient factual basis to support the plea of no contest to the charge of Assault With Intent to Commit Murder.

Counsel, has the Court complied with the court rule?

MR. RUIS: You have, Judge.

MR. TRACEY: You have, your Honor.

THE COURT: Thank you, gentlemen. I find the plea of no contest to be accurate, to be freely, knowing and voluntarily and understandingly offered without undue influence, compulsion, duress or the promise of leniency or benefit except as stated on the record. I find a sufficient factual basis for the plea of no contest from the Preliminary Examination transcript and I accept the plea of no contest to the charge.

I order the Defendant and his lawyer to appear at the Circuit Court Probation Office on March 14, 1997 at 1 p.m. for review of the Presentence Report and to appear before this Court on March 24, 1997 at 11 a.m. for sentencing. For the record, I am supplying to the respective lawyers and Mr. Mix copies of the Administrative Order well as the Scheduling Order in this matter. Mr. Mix has appears pursuant to his bond authorization. The bond authorization will be continues to sentencing.

Is there anything further, Mr. Prosecutor?

MR. RUIS: No, your Honor.

Transcript Page 12

THE COURT: Mr. Tracey?

MR. TRACEY: No, your Honor.

THE COURT: All right, that's all. Thank you very much.

MR. TRACEY: Thank you

(At 2:33 p.m., proceeding concluded)

Transcript Page 13

STATE OF MICHIGAN)
)
COUNTY OF BERRIEN)

I certify that this transcript, People of the State of Michigan versus Thomas Arthur Mix, case number 96-3318-FC-M, consisting of 13 pages, is a complete, true and correct transcript of the proceedings and testimony taken in this case on Friday, February 21, 1997.

June 17, 1997

/s/ JoAnne Williams
JoAnne Williams, CER 4963
BERRIEN COUNTY TRIAL COURT

Berrien County Courthouse
1205 North Front Street
Niles, MI 49120

STATE OF MICHIGAN
IN THE BERRIEN COUNTY TRIAL COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN

v. **Case No. 96-3318-FC-M**

THOMAS ARTHUR MIX,
Defendant.

FELONY SENTENCING

BEFORE THE HONORABLE PAUL L. MALONEY,
CRIMINAL DIVISION JUDGE

Niles, Michigan - Monday, March 24, 1997

APPEARANCES:

For the People: HENRY W. RUIS (P-35118)
South County Building
1205 North Front Street
Niles, MI 49120
(616) 687-1294

For the Defendant: JAMES J. TRACEY (P-37723)
302 East Main Street
Niles, MI 49120
(616) 948-0777

RECORDED BY: JoAnne Williams, CER 4963
Certified Electronic Recorder
Berrien County Trial Court
(616) 687-1275

Niles, Michigan

Monday, March 24, 1997 - 11:14 a.m.

THE COURT: This is file number 96-3318, the People of the State of Michigan versus Thomas Arthur Mix. This matter is before the Court for sentencing as a result of the Defendant's plea of no contest to the offense of Assault With Intent To Murder. The Court wants to sate for the record at the beginning that I have received requests from the media, from the Niles Daily Star, the Herald-Palladium to take photographs and to record, from WSJV-TV Channel - - of South Bend to record video and audio and from the South Bend Tribune to take photographs. Mr. Ruis is here on behalf of the People.

Mr. Ruis, what is your request regarding the request of the media?

MR. RUIS: I have no objections.

THE COURT: Mr. Tracey, what is your position, sir?

MR. TRACEY: I have no objections, your Honor.

THE COURT: All right. The Court will grant the requests of the medial to take photographs and otherwise as requested pursuant to their petitions.

The record should reflect that Attorney James Tracey is here on behalf of the Defendant. The Prosecutor is Mr. Ruis. The Court has had prepared a Presentence Investigation Report as well as a SIR Report. I've also received numerous letter

communications in this matter previous to today and the Court also received 2 letters provided by Mr. Tracey this morning as well.

Mr. Tracey, are there any additions or corrections to the Presentence Report?

MR. TRACEY: Yes, Judge, I have several here. First off, page 2, paragraph 2, the last sentence indicates that Mr. Mix has fled the scene. Mr. Mix maintains that he did not flight - - flee the scene. First stop, he called and asked the neighbors to call 911. He assisted the victim and it was only after they requested that he leave, under the false fact that he thought that there was a warrant for his arrest he left. He did flee at that point and time, but not initially. He did stop and assist.

THE COURT: Well, is the factual assertion in the paragraph correct to the extent that Mr. Mix did not wait for the police?

MR. TRACEY: He left just prior to the police arriving. He made - - he made certain that they were on their way. There was an ambulance on the way and then he did leave. So it is factually correct that he did leave the scene eventually, but not until assistance was on its way.

THE COURT: And there are facts, if I recall correctly, in the Presentence Report the additionally facts you're eluded to, that is, an emergency vehicle was called and that

apparently that he approached the victim on at least one occasion while she was on the ground. Those are elsewhere contained in the Presentence Report. Correct?

MR. TRACEY: That's correct.

THE COURT: While the Court understands that be the facts, I think the factual assertion that the Defendant fled the scene is accurate to the extent that he did not wait for the police authorities to arrive. But the Court also notes the other material that you just eluded to, Mr. Tracey.

MR. TRACEY: Thank you, Judge.

THE COURT: Go ahead.

MR. TRACEY: On the same page, paragraph 4 indicated that the Evaluation and Plan that Tom reported that he had had an abusive relationship with other girlfriends. He maintains and claims that he did not indicate that he had abusive relationships with other parties.

THE COURT: All right. This is the fourth paragraph in the Evaluation and Plan?

MR. TRACEY: Yes, it is the second sentence, Judge. Excuse me, it's the third sentence of the report. It says, "The victim reports that Thomas, himself, had an abusive - - was an abusive individual and had abused former girlfriends." Mr. Mix maintains that, that is incorrect that he had abusive relationships with prior parties.

THE COURT: All right. Mr. Ruis?

MR. RUIS: Well, Judge, it is obvious that this came from the victim in this matter as she relayed that to Presentence Report preparer. I guess, Judge, in terms - - the Defendant can disagree with that if he wants. That is coming from the victim herself, however, concerning Mr. Mix. So I guess you could consider for what it is worth, Judge.

THE COURT: Well, the first part of the sentence reports that at least from the victim's standpoint that Mr. Mix is an abusive individual. That's a statement of her opinion. The Court will strike the language, "... and has abused former girlfriends." The Court was not giving that any weight anyway. So the Court will strike the last phrase in the sentence ".... and has abused former girlfriends." And I have given it no weight, Mr. Tracey.

MR. TRACEY: Thank you, your Honor. On the same page, page 2, paragraph 7, which is under - - it is the last paragraph of the Evaluation and Plan, indicates that the physical evidence would suggest that Mr. Mix was traveling at a high rate of speed. He obviously doesn't dispute the physical evidence, but he does maintain that he was not traveling at a high rate of speed. That is was wet. It was this time of the year or a little bit earlier than this, and the ground was extremely wet and it didn't take a high rate of speed to create the physical evidence of the tire tracks and such in the yard. That he was traveling at a high

speed. He doesn't dispute the physical photo's or the physical evidence itself, but maintains in his own opinion, he was not traveling at a high rate of speed.

THE COURT: All right. Well, the Court is - - for the factual basis for purposes of this plea, relied on the Preliminary Examination testimony and that is the testimony that I am relying on for purposes of establishing the offense variables in this case and the factual record for purposes of this sentencing. I recognize that the Defendant's view that and it is only his opinion that he was not driving at a high rate of speed. But that sentence will remain because I think it is consistent with the Preliminary Examination testimony.

MR. TRACEY: On page 4, line 5, is a - - I believe is a typo. It should be Paula instead of Paul referencing the victim.

THE COURT: Indeed. That change will be made.

MR. TRACEY: Nothing further, Judge.

THE COURT: All right. Mr. Ruis, any additions or corrections to the Presentence Report?

MR. RUIS: No, your Honor.

THE COURT: The Court has scored this case as a D-4 under the Michigan Sentencing Guidelines resulting in a guideline range of 180 to 300 months or life.

Mr. Tracey, do you concur with that scoring?

MR. TRACEY: Yes.

THE COURT: Mr. Ruis, do you concur with that?

MR. RUIS: Yes, Judge.

THE COURT: All right. Mr. Ruis, is the victim in this case present and does she wish to address me?

MR. RUIS: She is here, your Honor, and I understand that she would like to address the Court.

THE COURT: All right, thank you.

Ma'am, Ms. Caballero, if you would step - - move forward, ma'am. All right. Ms. Caballero, you have the right under the Victim Rights Act to address me regarding the sentencing of Mr. Mix in this matter. You have previously submitted a Victim Impact Statement which I have read in great detail, but you do have the right to address me here in Court today and I'll be happy to hear from you if you wish to say anything.

MS. CABALLERO: Yeah, I just would like to let you know that my Victim Impact Statement is not even a good representation of what I've been through entire incident. The last year of my life has been terrible and it's going to be a very long time before it starts to get any better, if it does get any better. I presume - - I'm hoping that as the years go by, I will learn to live with this a lot easier, but the way I feel right now, I would be better off dead than the way I am right now.

THE COURT: And as I understand it, ma'am you have sustained injuries that put in a wheelchair and you are

paralyzed from the shoulders down. Is that correct?

MS. CABALLERO: Yes.

THE COURT: Is there anything else that you wish for me to consider, ma'am?

MS. CABALLERO: No.

THE COURT: All right, thank you for being here ma'am. We appreciate it. I am sure it was very difficult for you to be here today. I wish you God's speed in your recovery.

MS. CABALLERO: Thank you.

THE COURT: Thank you.

Mr. Ruis, anything on behalf of the People?

MR. RUIS: Judge, obviously this is a very difficult case and I thought about it this weekend what I was going to tell the Court at this point and time. And I couldn't really think of anything over the weekend what to say. I got up this morning, it was a nice morning, took the dog for a walk out in the back forty. It was sunny, the birds were out singing. And, finally, it dawned on me that the victim in this matter, Paula, couldn't even do what I was doing at the time. Couldn't go out and take a walk and enjoy the birds. Essentially, what Mr. Mix did to her is rob her of the ability to lead a normal life. And I guess what I concluded, Judge, is that there aren't enough words to say or adequately address what Mr. Mix did to her. In essence what he had done is sentenced her to life in that wheelchair. And as she

just told you, sometimes she thinks she would be better of dead because of what has happened. And how do you address that? My only suggestion, Judge, is how you address is that you sentence Mr. Mix to the maximum amount of time allowable under the guidelines for what he has done. Thanks.

THE COURT: All right. Thank you, Sir.

Mr. Mix, if you would approach the podium, sir, with your lawyer.

Mr. Tracey, is there anything you wish to say on behalf of your client?

MR. TRACEY: Yes, Judge. As Mr. Ruis points out, this is an entirely terrible incident to deal with. Mr. Mix has maintained all along that this was an accidental thing. He is extremely remorseful for it. If the victim had not been injured to the extent that she was, they may have all looked a lot different to the Court. And I think if Mr. Mix would have stayed on the scene and continued to assist, it might all look a lot different to the Court. I think Tom, in my discussions with him, is an extremely rehabilitative type person. He has had problems in the past, yes, and he's got a big problem here today with this, but I don't think that there is no hope for Tom. I think that Tom has learned an extreme lesson in all of this. He has always expressed to me remorse and the difficulties with what happened to the victim in this matter and his feelings in that regard. His

feelings have not been with what doing to happen to Tom in this instance. Where's Tom going and how long is Tom going to be gone. His feelings have always been a concern for the victim here. And under different circumstances maybe this would all look a little different. But I think Tom is an extremely rehabilitative person and he has maintained it was all accidental all along. Thank you.

THE COURT: All right. Thank you, Mr. Tracey.

Mr. Mix, anything you wish to say, sir?

THE DEFENDANT: It's too bad that it had to happened. It never should have wound up this way. Like Mr. Tracey said, I am very sorry for what happened. It should have never been like this. We did have a good relationship at times, some arguing and everything, but I'm just sorry that it had to come to this and I apologize to Paula and her family. I'm very sorry for what I've done and I'm willing to pay any consequences that I have coming before me. Before this matter, like I said, it was an accident. It never should have happened. It tried to assist her in every way I could. I should have never left the scene, but I did make sure that people got there when they were supposed to have got there and everything was taken care of so she was not going to be left along. I'm - - I - - I'm prepared to do whatever it is that I'm going to have to do. Just say again, this should not have happened and I'm very sorry for what did happen. Thank you.

Transcript Page 12

THE COURT: All right. Thank you, Mr. Mix.

Mr. Tracey, do you have something further?

MR. TRACEY: Nothing further, Judge.

THE COURT: All right. Well, to say that this crime has catastrophic effects on Ms. Caballero is an under statement. She survived because of the intervention of medical authorities that allowed her to live. And my hope is that she survived for a reason and that's because there are things that Ms. Caballero can do with the rest of her life albeit from a wheelchair that will benefit society and mankind and the people around her.

The Court read the Preliminary Examination transcript and this was not an accident. This was an utter disregard by this Defendant of the life and limb of Mr. Caballero. And this was only after a criminal history that places Mr. Mix in the highest prior record category under the Michigan Sentencing Guidelines. He has committed at least 1 prior felony based on my review of the Presentence Report for which he received prison after a violation of probation. Having discharged from parole approximately 3 years before this - - 2 years or so before this incident. And after discharge from parole, he had some misdemeanor offenses, 3 actually. So it is apparent to me that Mr. Mix, despite the fact that he has been to prison once before, had not learned his lesson. And we have here a situation where he used his automobile in such a way as to place

Ms. Caballero in the physical condition that she's in for the rest of her life.

I recognize the recommendation of the Department of Corrections here, but the Court is going to exceed it. This is the guidelines sentence however, and I will give Mr. Mix credit for 48 days already served, but I do sentence him the Michigan Department of Corrections, his reception facility will be in Jackson, for life, credit for 48 days. He is to pay the sum of $ 60 dollars to the Crime Victims Rights Fund within 30 days after release from custody. As I have said before, this is the guidelines sentence. I do it for the punishment of the offender as well as, hopefully, deterrence from others - - of others who might be of a like mind to commit such a offence in the future.

Mr. Mix, I advise you, sir, that you have the right to file an Application For Leave To Appeal your sentence and conviction to the Michigan County of Appeals. If you are financially unable to provide a lawyer to perfect an Application For Leave To Appeal, the Court will appoint an attorney and furnish that attorney with portions of the transcript and the record that the Court requires to prepare a post-conviction motion and to perfect an Application For Leave To Appeal. A request for the assistance of a lawyer must be made in writing within 42 days of today's day. I have had the Court Officer give to Mr. Mix the document

Transcript Page 14

that he uses to file a Petition for Court Appointed Counsel at public expense.

Mr. Mix, have you received the document?

THE DEFENDANT: Yes.

THE COURT: All right. The Defendant is remanded to the custody of the Sheriff for execute of the sentence.

(At 11:34 a.m., proceedings concluded)

Transcript Page 15

STATE OF MICHIGAN)
)
COUNTY OF BERRIEN)

I certify that this transcript, People of the State of Michigan versus Thomas Arthur Mix, case number 96-3318-FC-M, consisting of 15 pages, is a complete, true and correct transcript of the proceedings and testimony taken in this case on Monday, March 24, 1997.

June 18, 1997

/s/ JoAnne Williams
JoAnne Williams, CER 4963
BERRIEN COUNTY TRIAL COURT

Berrien County Courthouse
1205 North Front Street
Niles, MI 49120

Transcript Page 1

STATE OF MICHIGAN
IN THE BERRIEN COUNTY TRIAL COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff/Appellee,

v. **Case No. 99-3318-FC-M**

THOMAS ARTHUR MIX,
Defendant/Appellant.

MOTION TO WITHDRAW NO CONTEST PLEA
MOTION FOR EVIDENTIARY HEARING
MOTION TO STRIKE INFORMATION FROM PRESENTENCE INVESTIGATE REPORT

BEFORE THE HONORABLE PAUL L. MALONEY,
CRIMINAL DIVISION JUDGE

St. Joseph, Michigan - Monday, February 2, 1998

APPEARANCES:

For the People: HENRY W. RUIS, P35118
Assistant Prosecuting Attorney
811 Port Street
St. Joseph, MI 49085
(616) 983-7111, ext. 8311

For the Defendant: ALFRED MILLSTEIN, P29210
Attorney at Law
2715 Cadillac Tower
Detroit, MI 48226
(313) 438-1699

RECORDED BY: Cara Coulston, CER 4768
Certified Electronic Recorder
(616) 983-7111, ext. 8764

Transcript Page 15

A Is wasn't nec —

Q You worked out the contents of what you have asked for informally with the Prosecutor.

A Correct

Q Is that right? Okay. I know it's not included in this particular discovery order, and I don't mean to sandbag you about holding it and not giving it to you to read, but let me-if you differ with what I say just tell me. There's nothing that I see in the discovery order asking for Mr. Mix's criminal record. Is that – do you challenge that thought, that statement?

A It probably isn't in there, no.

Q Okay, I'm just going by what your regular practice is. Did you–is your practice–or, let me change that. Did you, at any time, ask the prosecution for a copy of his criminal record?

A I don't know whether I asked for it. The Prosecutor probably allowed me to see it –

Q Okay.

A - - in his file. I don't know that I formally, physically asked for a copy of it, but I probably was - - has access to it.

Q Okay.

A In fact, I know I did.

Q Okay. And do you know when that was roughly?

A I would assume it was probably at the time of my initial Court

conference or whatever we had at that point. Pretrial was over with, so that the case conference, or whatever date after I was retained, I was initially in Court then I wouldn't have access to that.

Q Would that be in the early part of your representation or towards the end?

A Early part.

Q This went on for quite a number of months, did it not?

A A couple months, yes, I think so.

Q Correct me if this doesn't sound right. I show you as being retained - -

A Tom met me on a Saturday morning at my office.

Q December 17th?

A That's - -

Q No that's - -

A The 17th is - -

Q - - the discovery order.

A - - a Tuesday, I think.

Q Okay.

A It would've been the 14th, I believe.

Q Okay. But it was in the early part of your representation that you saw his criminal record in the Prosecutor's Office.

A It would've been either toward the end of December or into February, one of the two.

Q Did you understand that to be a complete criminal

position was in terms of how the accident occurred and what caused it and what his state of mind was, and you were (unintelligible) and participating in whatever was going to resolve the case before the trial date, would it have been your view that a guilty plea was possible given his state of mind?

A I don't know. He could answer that better than I.

Q Now when the offer came up in your discussions with the Prosecutor, the offer was plead to assault with intent to murder and drop the two habituals and a sentence within the guidelines. Is that correct?

A Correct.

Q Okay. Did - - at that - - when you approached Tom with that offer, did you compute the guidelines?

A I think there was an attempt to compute them at that time, but his prior record was not completed until the Presentence Reports were available.

Q An attempt by whom to compute them?

A Either myself and/or the Prosecutor together.

Q Did you sit down and try to compute them?

A I think so.

Q And did you come up with a figure?

A I believe so.

Q What was the figure?

A I don't know precisely.

Transcript Page 25

Q Do you have anything to refresh your memory?

A No, I don't. I sent - - unless there - - I sent my entire file to you and - -

Q Right.

A - - if there was - -

Q I didn't see anything in there that tells me that. I can just let you know that.

A Okay. Then, no.

Q Did the figure of 8 to 20 guidelines enter into that particular phase of the discussions?

A It may have.

Q Okay. You're not sure. You say it may have.

A Right.

Q Did it ring a bell with you?

A I remember I think the computations that were made were different than what was eventually put forth in the Presentence Reports.

Q Okay. When you had a plea offer that included a sentence agreement, and that sentence agreement was to stay within the guidelines, what significance did you attach to that in terms of (unintelligible) an understanding on the part of the Defendant as to what he was pleading to?

A That it would - - the sentencing would be within what the guidelines has scored.

Q Okay. Did you have any perception that those

Transcript Page 26

guidelines might rise to the level of a life sentence?

A Yeah, I believe so.

Q Did you discuss that part with Tom?

A We discussed it at the presentence meeting that we had.

Q At the presentence meeting, which would be when?

A I don't know when it was.

Q You mean after the plea.

A Right.

Q When you went - - let me - -

A We reviewed his Presentence Report.

Q Okay. Let me lead you a little bit. Is it a fact that you went down with Tom to the Probation Department - -

A Right.

Q - - for a presentence conference? Is that the time at which you let him know about the potential life sentence included in the guidelines calculation?

A Yes. We, in detail, went through that report.

Q Okay. But that was at the presentence interview after the plea.

A Right.

Q Okay. Before the plea, did you discuss that maybe the guidelines are going to include a life sentence?

A Specifically I don't remember that we did.

Q Okay. Would you consider that confronting with that type situation it would be correct decision not to

thoroughly explore and definitively, as best you could, let him know that he might confront a life sentence under those guidelines?

A I thought that we did.

Q You thought that you let him know that the guidelines might include a life sentence. Is that what you's saying?

A I don't know about the specifics of that, but that it is certainly going to be scored with some degree of accuracy and that he can dispute that scoring.

Q Okay. Would it have - - in your experience, would it have been possible before coming to the plea agreement, before arriving at a plea agreement, to definitively determine what the guidelines were going to be?

A As best as whatever information I had available to do that, yes.

Q Okay. I'm asking in a more precise fashion. Would you feel it incumbent upon you, as the attorney in that situation, to definitively make the guidelines calculation? I understand that sometimes you have hedge it a little bit, but did you look at, for example, the offense variables and see if there was any contest possibilities, any discretionary issues that would come up in the offense?

A With whatever information I had available at that ....

make a recommendation in this case?

A I just don't remember whether - -

Q Oh - -

A - - I did or not.

Q - - okay.

A And I - - the only thing I do remember was that the morning that there was a plea taken I had to be elsewhere, so we were in Court around eleven o'clock I believe, other than earlier in the morning, and that Tom wanted to discuss what he was going to do with his family members. And so the Court allowed us to come back in the afternoon after he did that, and that's when the plea was taken. So I guess there was, you know, some time frame there where I wasn't with Tom or in his presence and then the plea was taken thereafter.

Q And is it correct that from what you know about it, he did not know that the guidelines would be 180 to 300 or life?

A Correct.

Q Okay. If you had known that the guidelines were going to be 180 to 300 or life, can you say whether or not you would have recommended that he accept that plea?

A I can't really say that I would or wouldn't.

MR. MILLSTEIN: Okay. That's all I have, your

Transcript Page 32

A I don't remember any specifics about it.

Q Now you do a rough calculation as far as the guidelines go prior to Mr. Mix's plea. Correct?

A Yes.

Q All right. And there comes a point in time after the plea, again, where you have to sit down with your client - I believe it was March 14 - at least that's what the Court file shows - of 1997 where you meet with Mr. Mix and you go over the presentence report. Right?

A Yes.

Q And there the guidelines are starring you right in the face what they are. Correct?

A Yes.

Q Now I'm sure that you went over that with Mr. Mix. Right?

A Yes, I did.

Q Did he say anything to you about, hey, what's going on here, that's pretty high, I don't like that, we better say something to the Court? Did he do any of that?

A I don't remember any specific conversations about that. I may have discussed with him that, you know, ultimately it was up to the judge what he did and that the agreement was that he stay within the guidelines; that he couldn't, without the ability to revoke the plea, do anything worse than that and that he certainly has the option of something less.

Transcript Page 41

A It was a few days before my trial was supposed to start. I believe it was the 21st of March.

Q First time it came up?

A First time it came up.

Q Okay. Now describe what discussions you had in that particular time frame.

A I went to Court to meet with him at the status conference. And as soon as he came into the room he asked me had the Prosecutor made any deals with me, offered me any deals. I told no.

Q Okay. Let me interrupt you just a minute. Were you talking to the Prosecutor at that time for - -

A No.

Q - - any reasons?

A No, I wasn't.

Q Okay. Go ahead.

A Then he proceeded to tell me wait a minute. He left the room. A little while later he came back and said, okay, this is what the Prosecutor agreed to do, which was to a plea no contest to assault with intent to murder, he would drop the two supplement charges, and 8 to 20 would be my guidelines.

Q All right. Was there any discussion of a guilty plea?

A No.

Q Did you approach the idea of a no contest plea?

A No.

Transcript Page 44

A Yes

Q Okay. Were you concerned about civil liability and protecting your assets?

A Not at all.

Q Whose idea was civil liability?

A That was the - - my attorney, Mr. Tracey, brought that onto me.

Q If you had been required to plea guilty to assault with intent to murder at that time, would you have been willing to do so?

A Excuse me?

Q If you had the opportunity at that time to plead guilty to assault with intent to murder, would you have done so?

A No.

Q Why?

A 'Cause at the time I felt it was an accident, that I did not do it on purpose.

Q Now you said that you were told that the deal was a guideline sentence and that your guidelines would be 8 to 20.

A Yes.

Q Who told you that?

A Mr. Tracey.

Q Was it ambiguous? Was it like maybe or maybe it would be different, or was it fairly firm that he said that?

A He was pretty firm on that, but he said the Judge could not - - he could give me no less than 8, no more

Transcript Page 45

than 20, but he could give me somewhere in-between, but probably 8 to 20 would be what I would get.

Q Did he say what would happen if the Judge didn't give you that?

A Excuse me?

Q What would happen if the Judge didn't stick with the sentence bargain?

A He just told me that the Judge did not have to abide by the plea bargain, that the Judge could do what he wanted to.

Q And what would be the effect of that?

A He did not say.

Q Did you have any understanding that you would be able to withdraw the plea if - -

A Yes.

Q - - the Judge did not stick to the bargain?

A Yes.

Q Did Mr. Tracey tell you that?

A The Judge himself told me that.

Q Well, now I'm talking about before - - well, the Judge told me that at the plea. Right?

A Yes.

Q Okay. Did you have that understanding before the plea?

A No.

Q But you did understand that would be the deal, that it would be 8 to 20.

Transcript Page 46

A Yes

Q Okay. Did he ever - - did Mr. Tracey ever sit down with you in terms - - you know, when you were talking about taking the plea to a guideline sentence, did he ever go through how the guidelines were computed with you?

A No.

Q Did he ever sit down with a sheet of paper or book that shows that here's how they look at your prior record, and here's how they look at what the crime was like, and this is now they compute the guidelines, and this is what might change and what might not change? Did you have any discussions anywhere resembling that - -

A To my knowledge, no.

Q - - with Mr. Tracey?

A To my knowledge, no.

Q Okay. Now I'm going to show you your PSI, a Presentence Investigation Report. Let me just lay a little foundation. You plead guilty - - you plead no contest - -

A Right.

Q - - before Judge Maloney.
A Yes.
Q You were called - - were you called for a presentence interview at the Probation Department?
A Yes, I was.
Q And did you go down there?

Transcript Page 47

A Yes, I did.
Q And was Mr. Tracey with you when you did that - -
A We met down there.
Q - - interview?
A We met down there, yes.
Q For the interview?
A Yes. Not for the interview.
Q Okay. He was not with you at the interview.
A No, he wasn't.
Q Okay. Was there a time when he went with you to the Probation Department before - -
A To review - -
Q - - sentencing?
A - - the sentence - - the Presentence Investigation after it was completed.
Q All right. You and he went down and reviewed the Presentence Investigation preparing the sentencing. Right?
A Yes.

Q Okay. Now I'm going to show you your Presentence Investigation Report and show you where it says sentencing guidelines and it says 180 to 300 months or life, and I'm going to ask you to look at that.

A Okay.

Q Do you remember seeing that when you and Mr. Tracey went down to review the Presentence Report?

Transcript Page 48

A That was not one of the things we actually looked at, no.

Q But did you see it?

A Yes, I did see it.

Q And what impact did that have on you?

A It didn't have any impact because I was just under the assumption that's what the charge carried, that's why it was there. Not that's what my sentencing guidelines were going to be because I was under the assumption that 8 to 20 would be my guidelines.

Q All right. And when you went to review the presentence with Mr. Tracey, did he and you discuss this statement of 180 to 300 months - -

A No, we didn't.

Q - - of life that was on the Presentence - - on the face of the Presentence Report?

A No, we didn't

Q Okay. So you had no understanding - - you're saying

you had no understanding of - -

A Right.

Q - - of - - did you have any understanding that was going to be what your sentence as based on?

A No.

Q Okay. And I may have asked you this, but you and Mr. Tracey at that interview did not discuss the issue of the 180 to 300 or life.

Transcript Page 49

A No, we didn't.

. . . . .

CROSS-EXAMINATION

BY MR. RUIS:

Q Well, Mr. Mix, when you met with Mr. Tracey, I believe it was on March 14th, to go over this Presentence Report.

A Yes.

Q Why don't' you take a look at this. First page where it says recommendations. Do you remember seeing this page?

A Yes, I do.

Q Do you remember reading the paragraph there where it indicated what the Probation Officer was going to recommend to the Court?

A That the Probation recommended a prison term of 20 to 80 years.

Q Okay. Now that's a lot more than what Mr. Tracey told you the deal was supposed to be. Right?

A Exactly. But he said that's just what the presentence investigation department would recommend, not what they would be doing.

Q So you didn't say anything to Mr. Tracey about it? Hey, I want you to tell the Court this is wrong, something's going on here, this is way too much time?

Transcript Page 50

A He - -
Q Didn't it strike you to do something about that at all?
A No, he informed me that they would recommend whatever they wanted, but under the bargain that we had, that's what they would be going for.
Q Did you tell Mr. Tracey about your record?
A Yes, I did.
Q Do you remember Mr. Tracey testifying about when you looked at the Presentence Report some of the offenses you didn't remember? Do you recognize that?
A Misdemeanor offenses.
Q Okay. How about all those juvenile felonies you had?
A He was quite aware of it.
Q He didn't know about those either. Right?
A Yes, he did.
Q Oh, he did. You told him about that?
A At the time of our first consultation I explained to him all my past record. Some I could not verify at the time because I did not have my prior record with me, but I knew pretty much my whole prior record.
Q So this first page here where it says sentencing guidelines 180 to 300 months or life, you didn't think that was any big deal?
A I just was thinking that's what the charge itself carried.

Q And it's your testimony that Mr. Tracey didn't explain that to you.

Transcript Page 51

A Exactly.

Q Okay. Well, where does it appear on here, this document, anywhere in this Presentence Report 8 to 20?

A It does not.

Q It's never in there. Right? Didn't that strike you as odd?

A I was assuming that everybody knew what the plea bargain was supposed to be, so therefore I did not raise any issue with it.

Q Remember when you were in Court when you took the plea in front of this Judge, the no contest plea?

A Yes.

Q And one of the things the Judge told you about doing that was that you give up any right to claim later on that there was any sort of promises, threats made to get you to plead guilty. Remember that?

A Yes.

Q And you told the Def - - or, the Judge, no, there wasn't. Right?

A Right.

Q Why didn't you say something to the Judge about they 8 to 20 during the plea?

A It was under my understanding that he was already aware of it, and at the time of the sentencing that's what I would be receiving.

Q Did the Judge tell you that when you pled no contest to the offense?

Transcript Page 52

A No, sir.

Q Did anybody say anything about 8 to 20 there on the record when you took the plea?

A I was under the assumption that's from what my attorney, Mr. Tracey, told me of the 8 to 20 that everybody else would be vaguely aware of it - - or, would be aware of it so that would be what I would be getting.

Q Now when you were sentenced, you don't say anything to anybody about the 8 to 20. Right?

A To my attorney, yes, I did.

Q When?

A After - - at - - when Mr. Maloney sentenced me to life in prison I did say something to my attorney, what is going on, and my attorney did state, well, didn't he say at the time of the plea bargain if for any reason he exceeded your guidelines you could revoked your plea. And I said yes, and he said, well, sign the paper, which was my appeal paper, And I did that.

Q But you didn't sign anything in open Court about

anything about an 8 to 20, 10 to 20, whatever. Right? No.

A As soon as I was sentenced and I was token (sic) out of the courtroom before I could have a chance to say anything. But once I got back into the back room, the holding cell, I tried and tried and tried to try to get somebody come out here and say something, and plus try to get my attorney to come back. . . .

Transcript Page 54

REDIRECT EXAMINATION

BY MR. MILLSTEIN:

Q I can understand why you don't like a life sentence, but is there a factor that you didn't expect to get that sentence? Is that correct?

A Right.

Q Okay. After you were unable to get in touch with your attorney when you suddenly realized that you had been sentenced to life in prison, was there any follow-up that you did to try to get in touch with your attorney?

A Yes, I did. I called - -

Q How did you try to do that?

A I called my family and they tried to call him. They contacted him and they told them to tell me to - - for me to call them. I did try to call him from the jail, but

nobody ever answered my telephone call or nothing.

Q When you say you tried to call him, you tried to call where? The office?

A I called his office from - -

Q How many - -

A - - the jail.

Q - - times did you call the office?

A Five or six times.

Q And did you ever hear back from him?

A No. And I had my family do the same thing. And I

Transcript Page 55

tried to tell them to have him come to the jail to see me, but he never did.

Q Now referring, again, to the face page of the Presentence Report, Mr. Ruis mentioned that the recommendation was 20 to 80.

A Yes.

Q He was asking your feelings about that in terms of the plea bargain. Right?

A Yeah.

Q Okay. Wouldn't 20 to 80 be with - - did you perceive the 20 to 80 might be within the 8 to 20 that you were told about?

A No. I perceived that just was what the presentence investigation department was - -

Q What do you - -

A - - recommending.

Q What do you understand 8 to 20 to mean?

A Eight to 20 years?

Q Yeah, when you were - - when you say that you were told that you're going to have a guideline sentence, your guidelines were going to be 8 to 20, what did you exactly understand that to mean that you sentence would be?

A When Mr. Tracey came to me when the - - - with the plea bargain that was made between him and the Prosecutor, and he told me that my guidelines would be 8 to 20.

Q But what does that mean in terms of what your sentence would. . . .

Transcript Page 78

STATE OF MICHIGAN)
COUNTY OF BERRIEN)

I certify that this transcript, People of the State of Michigan versus Thomas Arthur Mix, case number 96-3318-FC-M, consisting of 77 pages, is a complete, true and correct transcript, to the best of my ability, of the proceedings and testimony taken in this case on Monday, February 2, 1998.

March 13, 1998

/s/ Cara Coulston
Cara Coulston, CER 4768
Berrien County Courthouse
811 Port Street
St. Joseph, MI 49085

STATE OF MICHIGAN
IN THE BERRIEN COUNTY TRIAL COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN

v. **Case No. 96-3318-FC-M**

THOMAS ARTHUR MIX,
Defendant.

COURT RULING ON MOTION TO WITHDRAW NO CONTEST PLEA AND FOR NEW TRIAL

BEFORE THE HONORABLE PAUL L. MALONEY, CRIMINAL DIVISION JUDGE

St. Joseph, Michigan - Monday, February 9, 1998

APPEARANCES:

For the People: HENRY W. RUIS, P-35118
Assistant Prosecuting Attorney
811 Port Street
St. Joseph, MI 49085
(616) 983-7111, ext. 8311

For the Defendant: ALFRED MILLSTEIN, P29210
Attorney at Law
2715 Cadillac Tower
Detroit, MI 48226
(313) 438-1699

RECORDED BY: Cara Coulston, CER 4768
Certified Electronic Recorder
(616) 983-7111, ext. 8764

Saint Joseph, Michigan
Monday, February 9, 1998 - 4:17 p. m.

THE COURT: This is file number 96-3318-FC-M, the People of the State of Michigan versus Thomas Arthur Mix. This matter is before the Court this afternoon for the Court's ruling on the Defendant's instant motion to withdraw his plea, and for new trial. The Court conducted an evidentiary hearing in this matter a few days ago. I reserved my ruling and indicated that I will issue my ruling from the bench today.

Attorney Alfred Millstein is present via the telephone for purposes of receiving my ruling. Counsel, you are on the line, is that correct?

MR. MILLSTEIN: That's correct. I'm Alfred Millstein for the Defendant.

THE COURT: Thank you, sir. Assistant prosecuting Attorney Henry Ruis is here on behalf of the People. Counsel, do either of you have any further argument before I proceed to issue my ruling?

MR. MILLSTEIN: I don't, your Honor.

MR. RUIS: No, Judge.

THE COURT: All right. Thank you. This matter is before the Court on Defendant's motion to withdraw his no contest plea after sentencing. The Defendant offered a no contest plea a few days before the scheduled trial in this matter, to the charge of assault with intent to commit murder. The Court.

subsequently sentenced the Defendant to life in prison pursuant to the guidelines as the Court found them at the time of sentencing. The Defendant has filed this instant motion to withdraw his plea asserting ineffective assistance of counsel by his retained lawyer Mr. James Tracey. At the hearing Attorney Tracey testified at length, as did Mr. Mix himself. The People did not offer any proofs at the evidentiary hearing. As I've indicated earlier, I took this matter under advisement and am now issuing my - - my ruling in this - - in this case.

Attorney James Tracey was the retained attorney of record for the Defendant at times operative to the instant motion. Mr. Tracey is an attorney of 13 years experience: 12 in Niles, Michigan in the southern portion of Berrien County and one in Lansing. He practices criminal law about 50 percent of the time on a retained basis only. From the fact adduced at the - - the testimony adducted at the preliminary examine - - or at the motion for the evidentiary hearing on this matter Mr. Tracey accessed the file of the Prosecutor pursuant to the discovery request and did, indeed - - based on his testimony the Court is persuaded, did indeed, consider the defenses for Mr. Mix of intoxi-cation and lack of intent to commit the offense as charged in the information, that being assault with intent to - - to murder. Ineffective assistance in the context of offering a plea, the appropriate focus on whether - - what is

whether the Defendant's plea was voluntarily, understandingly made. That's the Haynes case at 221 Michigan Appeals 551 at page 558, a 1997 case, as well as Oakland County Prosecutor case at 191 Michigan Appeals 113 at page 120, a 1991 case. The court is obviously also mindful of the Strickland United States Supreme Court case as well as McMann versus Richardson which are also cited in the Oakland - - Oakland County case. The question for this Court is not whether the Court would, in retrospect, consider the advice of counsel to be right or wrong, but whether the advice was within the range of competence demanded of attorneys in criminal cases. That's the Effinger case at 212 Michigan Appeals, page 67 at page. 70, a 1995 case.

The Defendant in this case, as I said before, testified at the evidentiary hearing. Mr. Mix is a person who, because of his prior contact with the criminal justice system, is not unfamiliar with the - - with the processes of the criminal justice system including offering a plea of guilty and the Michigan sentencing guidelines. During the course - - one of the issues before the Court is obviously the voluntary nature of the plea in this case. Mr. - - Mr. Mix acknowledged that it was his choice to plead nolo contendere. That's at page three of the plea transcript. Also acknowledged that if I accepted his plea of no contest, that he would be giving up any claim that it was not his free

Transcript Page 6

choice to plead no contest. That' page eight of the plea transcript. Mr. Mix also acknowledged that there was no other promises other than those stated on the record, and that - - for his plea and that there was no force, fraud, or tricks of any kind given to him in order to induce his plea of no contest. Again, that's page eight of the - - the plea transcript. The - - interestingly enough there was no indication on the no contest plea record of what there - - whether there was, or was not, an agreed upon guidelines range for this offense; and, indeed, the Court is persuaded that there was no promise to Mr. Mix, that the guidelines, either by his lawyer or anyone else, that the guideline ranges for his plea would be within a certain range. Mr. Mix also acknowledged at the plea proceeding that he did not wish to contest his factual innocence by pleading no contest. And, indeed, that's the very nature of a no contest plea; that the Defendant does not wish to contest his factual - - his factual guilt at a - - at the - - at a trial. That's the New case, People versus New, N-E-W, at 427 Michigan 482 at 493, that's a Michigan Supreme Court case.

Was this plea understandingly made? Both the Defendant and Mr. Tracey indicated that they had gone over the potential sentencing guidelines here. Mr. Mix was of the mind that the guideline range was going to be approximately eight - - was going to be eight years to twenty years. Mr. Tracey acknowledged that there was some discussions about that guideline ranges,

but the Court finds from the testimony that Mr. Tracey did not promise that those were - - that was going to be the guideline range. And there is significant testimony, and the Court accepts it, that Mr. Tracey was not aware of the entire criminal history of the Defendant, nor had the Defendant at the time that they were discussing the potential of a plea, did Mr. Mix recall all of his prior criminal record. But most importantly there was no promise made by Mr. Tracey or the Prosecutor that the guideline range was going to be the eight to twenty years that the Defendant testified about at the hearing.

The Defendant also, at the time of the plea, did not indicate for the record that he had been told anything about the guideline range of eight to twenty at th time - - neither at the time of the plea, nor at the time of sentencing. Accordingly, the Court find his assertion that he was promised or had a reasonable belief that the guideline ranges were - - were, in fact, going to be eight to twenty. The Court finds those assertions by the Defendant made at the hearing on this matter to be not credible.

The Court does find that Mr. Tracey did discuss the guideline ranges - one reviewing the presentence investigation report. That presentence investigation report clearly shows the guideline ranges to be significantly higher than eight to twenty, or the alternative sentence of life. The Court finds.

as a matter of fact that the Defendant did not raise a concern about the guideline ranges at the - - at the time that he and Mr. Tracey discussed the presentence investigation report several days before the actual sentencing in this matter. And, of course, the Defendant did not raise this issue during allocution or otherwise, even after the Court specifically indicated to him - - indicated to his counsel and him before proceeding to sentence what the guideline ranges were as calculated by the Court.

The Court finds that really, at bottom, this case concerns the Defendant's dissatisfaction with the life sentence that I ultimately did give him, and the Court cites the Holmes case at 181 Michigan appeals 488, a 1989 case. Any incorrect preliminary scoring of the guidelines was based on a mischaracterization of his prior record by Mr. Mix to his - - to his counsel. And when given the opportunity to indicate his dissatisfaction with the actual guideline range as the Court calculated it, Mr. Mix did not say anything to the Court. Obviously the Court could've dealt with that at that time, but he did not say anything about it, and can now not be heard to complain about it. At bottom it's the Court's opinion that this is a situation where Mr. Mix's hope for a lesser sentence went unfulfilled rather than any - - any incompetence, if you will, or a threshold. The Court finds that the representation of Mr. Tracey met the standard Strickland versus Washington

as well as the McMann versus Richardson cases.

Defendant also asserts that this plea was illusory. And for the reasons I'm about to state the Court finds that contention to be without merit as well. The Prosecutor dropped the habitual charges against the Defendant. Mr. - - Mr. Mix did have at least one prior felony offense. The Prosecutor did timely file the habitual information. And obviously, again, the Court ultimately gave the Defendant a life sentence, but that, in the context of dropping the habitual if I have given him a term of years, would've provided some bases to the Defendant, in fact that the disciplinary credit time he would've earned it had I given him a term of year sentence, rather than life sentence that I gave him. For that reason the plea was not illusory.

Again, I think we have a situation here where the Defendant's expectations went unfulfilled rather than any - - any merit in the contentions that were made at the hearing by the Defendant.

The Court would also note that the Prosecutor had a significantly strong case, in the Court's opinion, in this matter. I heard the preliminary examination testimony in this case. We have an individual who - - the victim here had catastrophic injuries. And the Court is of the belief considering all the facts and circumstances that the avoidance of a trial - - again, the hope went unfulfilled, but

the avoidance of trial was one which th Defendant potentially could have merited from. His expectations were obviously not borne out. And as I have indicated before I think at bottom that's the reason why the Defendant has filed the instant - - the instant motion here.

Defendant also indicated in his motion and raises the issue of the lack of - - concerning Mr. Tracey's competence, the hiring of experts. The Court would first point out that Mr. Tracey was a retained lawyer in this case. This statute cited by the Defendant deals with indigent defendants and it's, in the matter of appointment of experts, is within the - - the discretion of the Court. The Defendant has cited the Leonard case at 224 Michigan Appeals 569. The Court would point out that that case is distinguishable in that it's an indigent case and not one in which Mr. Tracey has been retained. Indeed my colleague, Judge Tolen, at the time that she considered his petition for a court appointed lawyer found that the, which is part of the court file, found that the Defendant was indeed not indigent. So the applicability of that statute is - - is a contingency not certain to occur in the first instance and, therefore, the Court finds no merit in the contention that the - - Mr. Tracey was not - - did not meet the standard for competence by not asking the Court to hire experts at Court expense for Mr. Tracey.

For all the reasons as stated the Court denies the

motion to withdraw the plea. Mr. Ruis, if you would present an order to Mr. Millstein under the seven day rule and submit it under the seven day rule the Court would be appreciative.

MR. RUIS: I will, Judge.

THE COURT: All right. Mr. Millstein or Mr. Ruis, are there any other additional items that you wish me to address?

MR. MILLSTEIN: No, your Honor. I don't have anything. You indicted I should submit a seven day order on that minor mater of the information on the - - on the presentence investigation report which I will do. And I understand from Cara that it's not necessary to have an order to the Judge to prepare the transcript.

THE COURT: Ms. - - if your asking - - Ms. Coulston is here. If you're asking her to prepare the transcript she will do so.

MR. MILLSTEIN: Right. She said that - - yes, Cara, I would ask you to do that and you indicated to me that you would do it. That's for today's hearing as well as the one last week.

THE COURT: All right. She's nodding her head in the affirmative, Mr. Millstein.

MR. MILLSTEIN: Okay.

THE COURT: All right?

MR. MILLSTEIN: Right.

THE COURT: Thank you, sir.
MR. MILLSTEIN: All right. Thank you, Judge.
THE COURT: You're welcome.

Transcript Page 13

MR. MILLSTEIN: Good-bye now.
THE COURT: Bye-bye. Okay
MR. RUIS: Thank you, Judge.
THE COURT: You're welcome.
(At 4:32 p.m., proceedings concluded)

Transcript Page 14

STATE OF MICHIGAN)
COUNTY OF BERRIEN)

I certify that this transcript, People of the State of Michigan versus Thomas Arthur Mix, case number 96-3318-FC-M, consisting of 12 pages, is a complete, true and correct transcript of the proceedings and testimony taken in this case on Monday, February 9, 1998.

March 13, 1998 /s/ Cara Coulston,
Cara Coulston, CER 4768
Berrien County Courthouse
811 Port Street
St. Joseph, MI 49085

Transcript Page 15

STATE OF MICHIGAN

IN THE TRIAL COURT FOR THE COUNTY OF BERRIEN

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff, **Trial Court No.**
-v- **96-3318-FC-M**
THOMAS ARTHUR MIX,
Defendant
_____/

ORDER

At a session of court held in the
Berrien County Courthouse in
St. Joseph, Michigan, on
the 9th Day of February, 1998

PRESIDING: HONORABLE PAUL L. MALONEY,
TRIAL COURT JUDGE

This matter came before the Court on Defendant's Motion for Withdraw of No Contest Plea. After hearing testimony and argument, the Court ruled Defendant was not entitled to withdraw his nolo contendere plea. For the reasons stated in its bench opinion, the Court ordered the Defendant's

Motion for Withdraw of No Contest Plea be denied.

IT IS SO ORDERED.

DATED: 2/11/98

/s/ Paul L. Maloney
PAUL L. MALONEY
Trial Court Judge

APPROVED AS TO FORM:

/s/ Alfred Millstein
ALFRED MILLSTEIN (P29210)
Attorney for the Defendant

Prepared by:
/s/ Henry W. Ruis
HENRY W. RUIS (P37723)
Assistant Prosecuting Attorney